

(22,575.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 954.

GEORGE A. LURIA, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

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1 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff-Appellee,
vs.
GEORGE A. LURIA, Defendant-Appellant.

Statement.

1909, Sep. 20. Complaint filed.

1910, Jan. 28. Answer filed.

Dec. 16. Stipulation as to facts filed.

" 21. Cause heard before Hon. Learned Hand, D. J.

1911, Jan. 28. Cause decided. Decree cancelling certificate of the naturalization of the defendant. Opinion, Hand, D. J.

M'ch 2. Final decree cancelling certificate of naturalization entered.

M'ch 4. Defendant's petition for appeal and order allowing appeal filed.

M'ch 4. Citation and proof of service filed.

M'ch 4. Assignment of errors filed.

2 United States District Court, Southern District of New York.

UNITED STATES, Plaintiff,
vs.
GEORGE A. LURIA, Defendant.

Plaintiff by Henry A. Wise, United States Attorney for the Southern District of New York, its attorney, complaining of the above named defendant, alleges on information and belief as follows:

First. That the plaintiff is a corporation sovereign.

Second. That the above named defendant does not now reside in the United States.

Third. That the above named defendant's last place of residence in the United States was in the Borough of Manhattan, City of New York, Southern District of New York.

Fourth. That on the third day of July, 1894, George A. Luria, the defendant herein, was by an order of the Court of Common pleas for the City and County of New York admitted to be a citizen of the United States of America and a certificate of said citizenship was thereupon issued to the said George A. Luria.

3 Fifth. That the said George A. Luria departed from the United States within a period of five years thereafter and has now established a permanent residence in the City of Johannesburg, South Africa.

Wherefore, by virtue of Section 15 of the Naturalization Act of June 29, 1906, the plaintiff asks that the Court make an order setting aside and cancelling said certificate of citizenship and vacating

the original order upon which the same was issued upon the ground that the said order and certificate were procured illegally and directing that the Clerk transmit a certified copy of said order to the Division of Naturalization of the Bureau of Immigration and Naturalization and a further certified copy of such order to the Clerk of the Court of Common Pleas for the City and County of New York, and allowing the plaintiff the costs and disbursements of this action.

HENRY A. WISE,
*United States Attorney for the
 Southern District of New York.*

Office & Post Office Address, Room 50, U. S. Court & P. O. Bldg.,
 Borough of Manhattan, New York City.

4 CITY AND COUNTY OF NEW YORK,
Southern District of New York, ss:

Herbert B. Gruber, being duly sworn, deposes and says:

That he is an Assistant to the United States Attorney for the Southern District of New York, and as such Assistant he has had special charge and direction of the preparation of the foregoing complaint and of the proceedings in such action.

That he has read the foregoing complaint and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the sources of his information and the grounds of his belief are certified copies of letters and papers on file in the office of the Secretary of State of the United States and that the reason why this verification was not made by the plaintiff is because it is a corporation sovereign.

HERBERT B. GRUBER.

Sworn to before me this 18th day of September, 1909.

FREDERICK L. CAMPBELL,
Notary Public, Kings Co.

[SEAL.] Cert. filed in N. Y. Co.

Endorsed: Complaint filed Sept. 20, 1909.

5 United States District Court, Southern District of New York.

UNITED STATES, Plaintiff,
 against
 GEORGE A. LURIA, Defendant.

The defendant above-named, by Albert M. Friedenberg, his attorney, answering the plaintiff's complaint herein, upon information and belief:

First. Denies each and every allegation contained in paragraph or subdivision of the plaintiff's complaint herein numbered "Second."

Second. Denies so much contained in paragraph or subdivision of the plaintiff's complaint herein numbered "Fifth" as alleges that the defendant "has now established a permanent residence in the City of Johannesburg, South Africa."

Third. Admits each and every allegation contained in paragraphs or subdivisions of the plaintiff's complaint herein numbered "First," "Third" and "Fourth."

For a first separate and distinct defense alleges:

Fourth. That on or about the 21st day of November, 1894, the defendant went to South Africa temporarily for the purpose of promoting his health, that he returned to the United States in the Spring of 1907, that on or about the 21st day of August, 1907, the defendant again went to South Africa temporarily for the purpose of promoting his health, and that he intends to and will shortly return to the United States for the purpose of performing the duties of citizenship therein and to continue his residence there.

6 For a second separate and distinct defense, alleges:

Fifth. That Section 15 of the Naturalization Act of June 29, 1906, on which this action is based and pursuant to which it is sought to set aside and cancel the certificate of citizenship and to vacate the original order upon which the certificate of citizenship was issued to the defendant herein, is unconstitutional and of no force or effect, in that it violates Article XIV, Section 1, of the Constitution of the United States of America, which declares that all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside; this defendant having been naturalized in the United States, being a resident of the State of New York and being subject to the jurisdiction of the United States; and in that said Act of June 29, 1906 violates Article I, Section 9, of the Constitution of the United States of America by seeking to impose a penalty and forfeiture on this defendant, the defendant absenting himself from the United States subsequent to his becoming a citizen thereof, by an *ex post facto* law, and by imposing upon him pains and penalties by means of a bill of attainder, in violation of Article I, Section 9, of the Constitution of the United States of America.

Wherefore, the defendant demands judgment herein dismissing the plaintiff's complaint herein and with costs and disbursements.

ALBERT M. FRIEDENBERG,
Attorney for Defendant.

Office and Post Office Address: 38 Park Row, Borough of Manhattan, New York City.

7 SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Albert M. Friedenberg, being duly sworn, deposes and says: That he is the attorney for the defendant in the above-entitled action and resides at No. 186 West 135th Street, and has his office at No. 38 Park Row, in the Borough of Manhattan, City of New York; that

he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That the reason this verification is not made by the defendant in person and is made by this deponent is that at present the defendant is not within the County of New York, where this deponent resides and has his office. That the sources of this deponent's information and the grounds of his belief as to those matters stated in the foregoing answer on information and belief, are letters and documents received by the American Jewish Committee from the defendant, transcripts of which are in the possession of this deponent.

ALBERT M. FRIEDENBERG.

Sworn to before me this 28th day of January, 1910.

WILLIAM R. RUST,

[SEAL.]

Notary Public, Kings County.

Certificate filed in New York County.

Endorsed: Answer filed January 18, 1910.

8 United States District Court, Southern District of New York:

THE UNITED STATES, Plaintiff,

vs.

GEORGE A. LURIA, Defendant.

The parties hereto, being of full age for the purposes of this action only, by their respective attorneys, hereby stipulate the following facts contained in paragraphs 1 to 17 hereof which may be read by either of the parties hereto upon the trial hereof, nothing herein contained to be construed as a waiver of the right claimed by the defendant to a jury trial herein.

1. This action was commenced by the filing of a praecipe in the office of the Clerk of this Court, and the issuing of a summons thereon on the 18th day of September, 1909. The complaint was filed in the office of the Clerk of this Court on the 20th day of September, 1909. The defendant appeared by Albert M. Friedenberg, his attorney, and filed his answer in the office of the Clerk of this Court on the 28th day of January, 1910, a summons having been served upon the defendant by publication in accordance with an order directing such service to be made, entered on the 21st day of September, 1909.

2. That the defendant, George A. Luria, was born at Wilna, Russia, on the 22nd day of February, 1868.

3. That the said George A. Luria emigrated to the United States, sailing on board the S. S. "Werra," from Bremen, Germany, on the 28th day of April, 1888, and arriving at the Port of New York on or about the 8th day of May, 1888.

4. That the said George A. Luria matriculated as a medical

student at the Medical College of New York University in the City of New York, on the 7th day of May, 1889, and attended said college as a medical student during the sessions of 1889-1890, 1890-1891, 1891-1892, and 1892-1893, and received a degree of M. D. therefrom on the 4th day of April, 1893.

5. That on the 30th day of June, 1892, the said George A. Luria declared his intention to become a citizen of the United States of America and to renounce forever all allegiance and fidelity to the Czar of Russia, of which he was at the time a subject, in the Superior Court of the City and County of New York, in the State of New York, a copy of which declaration of intention is hereto annexed and marked Exhibit "A."

6. That on the 3d day of July, 1894, the said George A. Luria applied to be admitted to become a citizen of the United States of America, in the Court of Common Pleas for the City and County of New York, and took the oath of allegiance and renunciation, and that on the 3d day of July, 1894, the said Court of Common Pleas made and entered its decree or order admitting the said George A. Luria to be and become a citizen of the United States of America, and that thereupon a certificate of citizenship was issued to him by the said Court, copies of which application, affidavit, oath and order or decree are hereto annexed and marked Exhibit "B."

7. That on the 27th day of August, 1894, the said George A. Luria applied to the Department of State of the United States of America for a passport for himself, a copy of which application is hereto annexed and marked Exhibit "C," and that on the 29th day of August, 1894, a passport numbered 16093, was issued to the said George A. Luria upon the said application, by the said Department of State.

8. That during the year 1894 and for some time prior thereto the said George A. Luria owned a drug store at No. 482 Sixth Avenue in the City of Brooklyn, County of Kings, State of New York, which drug store he sold on or about October 24th, 1894, to one Dr. I. I. Lourie.

9. That on the 19th day of June, 1893, the said George A. Luria applied for membership in the New York County Medical Association, which association is composed of persons practicing medicine in the County of New York, but he was never elected to membership.

10. That on or about the 21st day of November, 1894, the said George A. Luria left the United States and arrived at the Transvaal, South Africa, on or about the 22nd day of December, 1894.

11. That the said George A. Luria sojourned in the City of Johannesburg, South Africa, continuously from the said 22nd day of December, 1894, to sometime in the spring of 1907, he claiming that his health was impaired, and that it was therefore necessary for him to sojourn in a climate similar to that of South Africa; and that during the said period the said George A. Luria, for the purpose of earning his livelihood, practiced his profession as a physician in the said City of Johannesburg and joined the South African Medical Association composed of persons practicing medicine in South Africa, and also served in the Boer war.

12. That during the said period from 1894 to 1907 the said George A. Luria applied to the United States Consular Officers at 11 Pretoria and Johannesburg, South Africa, on three separate occasions, to wit, June 29th, 1899; March 20th, 1902; and February 6th, 1905; for passports, copies of which applications are hereto annexed and marked exhibits "D," "E" and "F" respectively, and that passports numbered 29, 151 and 168 were issued to him upon such applications by the United States Consular Officers.
13. That in the Spring of 1907 the said George A. Luria returned to the United States and remained in the United States until on or about the 21st day of August, 1907.
14. That from the 18th day of June, 1907, to the 30th day of July, 1907, the said George A. Luria attended a six-weeks' course in general at the Postgraduate Medical School and Hospital in the City of New York, and that he gave as his address upon entering the said school Post Office Box 188, Johannesburg, South Africa.
15. That on or about the 25th day of June, 1907, the said George A. Luria applied to the Department of State of the United States of America for a passport, a copy of which application is hereto annexed and marked Exhibit "G," and that on the 26th day of June, 1907, passport No. 36693 was issued to him upon the said application.
16. That during the said spring and summer of 1907 the said George A. Luria did not practice his profession as a physician in the City of New York, and stated to several persons in New York City that he did not then expect to stay in the United States, but was going to return soon to South Africa, giving no reason therefor.
17. That on or about the 21st day of August, 1907, the said George A. Luria left the United States for the Transvaal and arrived 12 at Cape Town, South Africa, on or about the 17th day of September, 1907, and left immediately for the City of Johannesburg, South Africa, where he has since continued to sojourn and to practice his profession as a physician, it being necessary to enable him to earn his livelihood, he having no other profession or business.
18. It is further stipulated that the plaintiff claims that under the provisions of Section 15 of the Naturalization Act of June 29th, 1903. (34 Stat. L. 601) it is entitled to offer and have received in evidence certain statements, duly certified, made by Hon. John H. Snodgrass, U. S. Consul at Pretoria, South Africa, and certain letters, reports and other documents attached thereto. The defendant claims that these statements, etc., are inadmissible as evidence. It is therefore agreed between the parties that the plaintiff may offer such papers, etc., in evidence and that the defendant may object to their admission as evidence.

Dated New York, December 8th, 1910.

HENRY A. WISE,

Attorney for Plaintiff.

ALBERT M. FRIEDENBERG,

Attorney for Defendant.

13 STATE OF NEW YORK,
County of New York, ss:

Addison S. Pratt deposes and says: I am an Assistant United States Attorney for the Southern District of New York and have charge of the above entitled proceeding; the controversy mentioned in the foregoing stipulation depending upon the facts therein stated and herewith submitted to the United States District Court for the Southern District of New York for decision is real; and the submission thereof is made in good faith for the purpose of determining the rights of the parties.

ADDISON S. PRATT.

Sworn to before me this 8th day of December, 1910.

[SEAL.]

FREDERICK L. CAMPBELL,

Notary Public, Kings Co.

Cert. filed in N. Y. Co.

14

EXHIBIT "A."

UNITED STATES OF AMERICA,

State of New York, City and County of New York, ss:

Be it Remembered, That on the 30 day of June in the year of our Lord one thousand eight hundred and ninety two personally appeared George A. Luria in the Superior Court of the City of New York (said Court being a Court of Record, having common law jurisdiction, a Clerk and a Seal), and made his declaration of intention to become a Citizen of the United States of America, in the words following, to wit:

I, George A. Luria do declare on oath, that it is bona fide my intention to become a Citizen of the United States of America, and to renounce forever all allegiance and fidelity to any foreign Prince, Potentate, State or Sovereignty whatever, and particularly to the Emperor of Russia of whom I am a subject.

Residence, 257 Rivington St.

Sworn this 30 day of June 1892.

[SEAL.]

THOMAS BOESE, *Clerk.*

Court of Common Pleas for the City and County of New York.

In the Matter of the Application of GEORGE A. LURIA, by Occupation Physician, to be Admitted a Citizen of the United States of America.

Applicant Arrived in U. S. May, 1888. Witness Became Acquainted with Applicant May, 1888.

STATE OF NEW YORK,
City and County of New York, ss:

Abraham S. Miller being duly sworn, says he resides in No. 72 Rivington Street, in the City of New York, and that he is well acquainted with the above-named applicant, and that the said applicant has resided within the United States for the continued term of five years at least next preceding the present time, and within the State of New York one year at least immediately preceding this application; and that, during that time, he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same.

A. S. MILLER.

Sworn in open Court, this 3rd day of July, 1894.

ALFRED WAGSTAFF, *Clerk.*

STATE OF NEW YORK,
City and County of New York, ss:

I, George A. Luria residing in No. 158 (the 8 written over 4) Forsyth St. do solemnly swear that I will support the Constitution of the United States; and that I do absolutely and entirely renounce and adjure all allegiance and fidelity to every foreign Prince,

15a Potentate, State or Sovereignty whatever, and particularly to the Emperor of Germany (sic) of whom I was before a subject.

GEORGE A. LURIA.

Sworn in open Court, this 3 day of July, 1894.

ALFRED WAGSTAFF, *Clerk.*

At a Special Term of the Court of Common Pleas for the City and County of New York, held in the Court House of the City of New York, on the 3 day of July, 1894.

Present: Hon. Henry Bischoff, Jr., Judge.

In the Matter of the Application of the Within Named Applicant to be Admitted a Citizen of the United States of America.

The said applicant appearing personally in Court, producing the evidence required by the acts of Congress, and having made such declaration and renunciation, and having taken such oaths as are by the said acts required, it is ordered by the said Court, that the said applicant be admitted to be a Citizen of the United States of America.

Enter

H. B., JR., J. C. C. P.

16

(Form for Naturalized Citizen.)

EXHIBIT "C."

No. 16093.

Issued Aug. 29, 1894.

UNITED STATES OF AMERICA,
State of New York, County of Kings, ss.

I, George A. Luria, a Naturalized and Loyal Citizen of the United States, hereby apply to the Department of State at Washington, for a passport for myself, accompanied by my wife [— — —], and minor children, as follows: — — —, born at — — — on the — day of — — —, 18 — — —, and — — — born at — — —.]*

I solemnly swear that I was born at Godutiski, Russia, on or about the 22d day of February, 1865; that I emigrated to the United States, sailing on board the S. S. Werra, from Bremen, Germany, on or about the 28 day of April, 1888; that I resided 6 years, uninterruptedly, in the United States, from May, '88, to July, '94, at New York City; that I was naturalized as a citizen of the United States before the Nat. Bur. Court of Common Pleas, at New York, on the 3d day of July, 1894, as shown by the accompanying Certificate of Naturalization; that I am the identical person described in said Certificate; that I am domiciled in the United States, my permanent residence being at City of Brooklyn, in the State of New York, where I follow the occupation of physician; that I am about to go abroad temporarily; and that I intend to return to the United

months.

States within — — — years, with the purpose of residing and performing the duties of citizenship therein.

[* Erased by pencil.]

Oath of Allegiance.

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation or purpose of evasion: So help me God.

GEO. A. LURIA.
(Signature of Applicant.)

Sworn to before me this 27 day of August, 1894.

[SEAL.]

THOMPSON SANTY,
Notary Public, Kings Co.

Description of Applicant.

Age: 29 years.
Stature: 5 feet 8 inches, Eng.
Forehead: Medium high.
Eyes: brown.
Nose: straight.
Mouth: small.
Chin: broad.
Hair: black.
Complexion: fair.
Face: oval.

Identification.

— — —, 19—.

I hereby certify that I have known the above-named Dr. G. A. Luria personally and know him to be the identical person referred to in the within described Certificate of Naturalization, and that the facts stated in his affidavit are true to the best of my knowledge and belief.

M. MARDFIN.

(Address of witness) 274 14 St., Br'klyn, N. Y.

Applicant desires passport sent to the following address:

G. A. Luria, M. D.
482 South Ave.
Br'klyn, N. Y.

18

(Copy.)

EXHIBIT "D."

Fee for Passport \$1.00
Fee for administering oath and preparing passport application 1.00

Naturalized.

No. 29.

Pretoria, S. A. R.

Issued June 29, 1899.

I, Geo. A. Luria, a naturalized and loyal citizen of the United States, hereby apply to the Legation of the U. S. at Pretoria, S. A. R. for passport for myself, [accompanied by my wife —— ——, and minor children, as follows: —— ——, born at —— on the — day of ——, 1—; and ——.]†

I solemnly swear that I was born at Wilna, Russia, on or about the 22d day of February, 1868; that I emigrated to the United States, sailing on board the "Werra" from Bremen, on or about the 28 day of April, 1888; that I resided 6 2/3 years, uninterruptedly, in the United States, from May, 1888, to Nov. 21, '94, at New York; that I was naturalized as a citizen of the United States before the City Court of Common Pleas at New York City, on the 3d day of July, 1894, as shown by the accompanying Certificate of Naturalization; that I am the bearer of Passport No. 16093, issued by A. Gresham on the 29 day of August, 1894, which is returned herewith; that I am the identical person referred to in said certificate and passport; that I am domiciled in the United States, my permanent residence there being at 482 South Ave. Br'klyn, in the State of New York, where I follow the occupation of physician; that I last left the United States on the 21 day of Nov., 1894, on board the "City of New York," arriving in Cape Town the 18 day of Dec., 1894; that I have resided in South Africa since the 18 day of Dec., 1894; that I am now temporarily residing at 19 Johannesburg; and that I intend to return to the United States within two years with a purpose of residing and performing the duties of citizenship therein.

[I have not applied for a United States passport elsewhere and been refused.]*

I desire the passport for the purpose of going to France and Germany.

[I have applied for registration at the American Consulate — at —.]*

[* Words and figures enclosed in brackets erased in copy.]

[† Erased by pencil.]

Oath of Allegiance.

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation or purpose of evasion: So help me God.

GEO. A. LURIA, M. D.

Legation
[American]* of the United States at Pretoria, S. A. R.

Sworn to before me, this 29 day of June, 1899.

[SEAL.] CHAS. E. MACIUM,
U. S. Consul.

Description of Applicant.

Age: 31 years.
Stature: 5 feet, 9 inches, Eng.
Forehead: Medium high.
Eyes: Brown.
Nose: Straight—Grecian type.
Mouth: Small.
Chin: Broad.
Hair: Black.
Complexion: Fair.
Face: Oval.

Identification.

PRETORIA, S. A. R., June 29, 1899.

I hereby certify that I know the above-named Geo. A. Luria
19a personally, and know him to be the identical person referred
to in the within-described Certificate of Naturalization, and
that the facts stated in his affidavit are true to the best of my knowl-
edge and belief.

E. A. VAN AMEINGE,
(Address of Witness) Ribbitt Street, Johberg.

Fee for Passport.....	\$1.00
Fee for administering oath and preparing passport applica- tion	1.00

[* Words and figures enclosed in brackets erased in copy.]

EXHIBIT "E."

Naturalized.

No. 151.

Issued Mar. 20, 1902.

I, George Alphonse Luria, a naturalized and loyal citizen of the United States, hereby apply to the Consul at Pretoria for a passport for myself, [accompanied by my wife — — —, and minor children, as follows: — — —, born at — — on the — day of — — —; and — — —]*

I solemnly swear that I was born at Wilna Russia on or about the 22d day of February, 1868; that I emigrated to the United States, sailing on board the S. S. Werra from Bremerhaven, on or about the 28 day of April, 1888; that I resided 6 years uninterruptedly, in the United States, from 1888 to 1894, at New York; that I was naturalized as a citizen of the United States before the Common Pleas Court of New York at New York, on the 3d day of July, 1894, as shown by the accompanying Certificate of Naturalization; that I am the bearer of Passport No. 29, issued by Chas. E. Macium on the 29 day of June, 1899, which is returned herewith; that I am the identical person referred to in said certificate and passport; that I am domiciled in the United States, my permanent residence therein being at Brooklyn, in the State of New York, where I follow the occupation of Physician; that I last left the United States on the 21 day of Nov. 1894, on board the S. S. New York, arriving in Southampton the 29 day of Nov., 1894; that I have resided in Johannesburg since the 22d day of Dec., 1894; that I am now temporarily residing at Johannesburg; and that I intend to return to the United States
21 within two years with a purpose of residing and performing the duties of citizenship therein.

[I have not applied for a United States passport elsewhere and been refused].*

I desire the passport for the purpose of identification.

[I have — applied for registration at the American Consulate — at —].*

Oath of Allegiance.

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation or purpose of evasion: So help me God.

GEO. ALPHONSE LURIA.

American Agency at Johannesburg.

[* Words and figures enclosed in brackets erased in copy.]

Sworn to before me, this 17 day of March, 1902.

[SEAL.]

WM. D. GORDON,
U. S. Consular Ag't.

Description of Applicant.

Age: 34 years.
Stature: 5 feet, 8 inches, Eng.
Forehead: high.
Eyes: brown.
Nose: straight.
Mouth: small—mustache.
Chin: Medium.
Hair: black.
Complexion: dark.
Face: Oval.

Identification.

MARCH 17, 1902.

I hereby certify that I know the above-named G. A. Luria personally, and know him to be the identical person referred to in
22 the within-described Certificate of Naturalization, and that the facts stated in his affidavit are true to the best of my knowledge and belief.

S. FEISSBERG,
(Address of Witness) Box 2974.

23

(Copy.)

Fee for Passport.....	\$1.00
Fee for administering oath and preparing passport application	1.00

EXHIBIT "F."

Naturalized.

No. 168.

Issued Feb. 6, 1905.

I, George Alphonse Luria, a naturalized and loyal citizen of the United States, hereby apply to the Consul at Pretoria for a passport for myself, [accompanied by my wife, —— ——, and minor children, as follows: —, born at —, on the — day of —, 1—; and —]*.

I solemnly swear that I was born at Wilna Russia on or about the 22d day of Feb. 1868; that I emigrated to the United States, sailing on board the S. S. Werra, from Bremerhaven, on or about

the 28 day of April, 1888; that I resided 6 years, uninterruptedly, in the United States, from 1888 to 1894, at New York; that I was naturalized as a citizen of the United States before the Common Pleas Court of New York at New York, on the 3d day of July, 1894, as shown by the accompanying Certificate of Naturalization; that I am the bearer of Passport No. 151, issued by W. D. Gordon on the 20 day of March 1902, which is returned herewith; that I am the identical person referred to in said certificate and passport; that I am domiciled in the United States, my permanent residence therein being at Brooklyn, in the State of New York, where I follow the occupation of Physician; that I last left the United States on the 21 day of Nov. 1894, on board the S. S. New York, arriving in Southampton the 29 day of Nov. 1894; that I have resided in Johannesburg since the 22d day of Dec. 1894; that I am now temporarily residing at Johannesburg; and that I intend to return to the United States within two years with a purpose of residing and performing the duties of citizenship therein.

[I have not applied for a United States passport elsewhere and been refused.]*

I desire the passport for the purpose of identification.

[I have — applied for registration at the American Consulate — at —.]*

Oath of Allegiance.

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation or purpose of evasion: So help me God.

G. A. LURIA.

American Consulate at Pretoria.

Sworn to before me, this 6 day of February, 1905.

[SEAL.]

Description of Applicant.

Age: 37 years.

Stature: 5 feet, 8 inches, Eng.

Forehead: high.

Eyes: brown.

Nose: straight.

Mouth: small (mustache).

Chin: round.

Hair: black.

Complexion: dark.

Face: oval.

Identification.

JOHANNESBURG, Feb. 6, 1905.

I hereby certify that I know the above-named George Alphonse Luria personally, and know him to be the identical person referred to in the within-described Certificate of Naturalization, and that the facts stated in his affidavit are true to the best of my knowledge and belief.

W. D. GORDON,
P. O. Box 1185, Johannesburg.

26

(Copy.)

No. 36693.

(Form for Naturalized Citizen.)

EXHIBIT "G."

Issued June 26, 1907.

United States of America.

STATE OF NEW YORK,
County of New York, ss:

I, George Alphonse Luria, a Naturalized and Loyal Citizen of the United States, hereby apply to the Department of State, at Washington, for a passport for myself, [accompanied by my wife, —— —— and minor children, as follows: —— —— born at ——, on the — day of —, 18—, and —— ——, born at ——.]*

I solemnly swear that I was born at Wilna, Russia, on or about the 22d day of February, 1868; that I emigrated to the United States, sailing on board the S. S. Werra, from Bremen, on or about the 28 day of April, 1888; that I resided 6 2-3 years, uninterruptedly, in the United States, from 1888 to 1894 & abroad to 1907, at New York City; that I was naturalized as a citizen of the United States before the —— Court of Common Pleas at New York City, on the 3d day of July, 1894, as shown by the accompanying Certificate of Naturalization; that I am the identical person described in said Certificate; that I am domiciled in the United States, my permanent residence being at New York City, in the State of New York, where I follow the occupation of physician; that I am about to go abroad temporarily; and that I intend to return to the United States within two years, with the purpose of residing and performing the duties of citizenship therein.

[* Words and figures enclosed in brackets erased in copy.]

27

Oath of Allegiance.

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation or purpose of evasion: So help me God.

G. A. LURIA.

Sworn to before me this 25 day of June, 1907.

[SEAL.]

CHAS. J. F. BOHLEN,
Notary Public, N. Y. Co.

Description of Applicant.

Age: 39 years.

Stature: 5 feet, 8 inches, Eng.

Forehead: high.

Eyes: brown.

Nose: straight.

Mouth: small (mustache).

Chin: round.

Hair: black.

Complexion: dark.

Face: oval.

Identification.

JUNE 25, 1907.

I hereby certify that I have known the above-named Geo. A. Luria personally for fifteen years, and know him to be the identical person referred to in the within-described Certificate of Naturalization, and that the facts stated in his affidavit are true to the best of my knowledge and belief.

MARCUS MARDFIN.

(Address of witness) 125 5 Ave. N. Y. City.

Applicant desires passport sent to following address:

Dr. Geo. A. Luria, 142 E. 19 St., N. Y. City.

28 [Endorsed:] Form No. 336. U. S. District Court, Southern District of New York. The United States versus George A. Luria. Stipulation. Henry A. Wise, United States Attorney, Attorney for U. S. Filed Dec. 16, 1910.

29 United States District Court, Southern District of New York.

Hon. Learned Hand, J., and a Jury.

UNITED STATES, Plaintiff,
v.
GEORGE A. LURIA, Defendant.

NEW YORK, December 21st, 1910.

Appearances:

Henry A. Wise, Esq., United States District Attorney, for plaintiff; by Addison S. Pratt, Esq.

Albert M. Freidenberg, Esq., attorney for defendant. Louis Marshall, Esq., of Counsel.

Mr. MARSHALL: I wish to raise a question which I think ought to be raised, that is, that we have a constitutional right to trial by jury in this case. This is not an equity suit in the strict sense of the word. Under the provision of the Seventh Amendment to the Constitution, as interpreted by the Supreme Court, we are entitled to a trial by jury.

The COURT: Overruled.

Mr. MARSHALL: Exception.

30 Mr. PRATT: I offer in evidence, the paper which was offered in evidence the other day.

Mr. MARSHALL: I understand that the stipulation has been offered in evidence, and is marked.

Mr. PRATT: Yes, that has just been handed up to the Court.

The COURT: That is not marked.

Mr. PRATT: Let it appear upon the record that the statement of facts agreed upon by the attorneys for both sides, is submitted to the Court, and constitutes a part of the record.

Mr. MARSHALL: And constitutes a part of the record.

Mr. PRATT: All right. The Government offers in evidence the paper which was offered the other day, and marked Exhibits 1 and 2, and which are the report of H. Elbert Loeser, American Consul General at Johannesburg, South Africa, and John H. Snodgrass, the United States Consul at Pretoria, South Africa, and the papers thereto annexed, and a copy of the Certificate by the Secretary of State, of a report of Edward N. Gunsaulus, Consul of the United States at Johannesburg, South Africa, and the two original letters thereto annexed, of Dr. W. Stewart, and Dr. J. Wright Matthews.

Mr. MARSHALL: I desire to object to all the documents to which Counsel has referred, and which he is now offering in evidence on the ground that they are incompetent, irrelevant and immaterial, and that they are hearsay, and that they are ex parte statements made by people who claim to be Public Officers, that they are letters written by individuals whom we have no opportunity to cross examine; that these documents are all res inter alios acta, and are in no sense legal evidence as against us; there is no

statute or law of the United States which gives it any probative force whatever.

The COURT: Objection overruled.

Mr. MARSHALL: Exception as to each and every one of the papers, including the statements of the reports and letters and other documents which have been offered in evidence.

Mr. PRATT: The Government rests.

Mr. MARSHALL: I move for a dismissal of the complaint in this case.

I. Because the Act has no application to the naturalization secured to the defendant in this case, under the law which was enacted previous to 1906, he not having been *been* naturalized by the law under which these proceedings are brought.

II. There is nothing in the facts disclosed by the record showing any foundation for the charge that defendant was guilty of fraud in procuring his certificate of citizenship, or that such certificate was illegally procured.

III. That insofar as the Act assumes to deprive defendant of the citizenship procured by him under a decree of a Court of 32 competent jurisdiction, in 1894, it is unconstitutional, in that it violates Article I, Section 8, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

IV. On the ground that the legislation violates Article I, Section 9 of the Federal Constitution because it is in effect a bill of attainder, and an *ex post facto* law.

V. That the legislation is unconstitutional, because it is an attempt on the part of the Court to nullify the decree of the Court, which issued to the defendant his certificate of naturalization.

Mr. PRATT: The Government also moves for judgment.

The COURT: Motion for the defendant denied.

Mr. MARSHALL: Exception.

The COURT: Decision reserved.

33 On this 23d day of November, 1907, before me John H. Snodgrass, American Consul, appeared Herman Albert Loeser, who, being duly sworn, says:

That he is American Consular Agent at Johannesburg; that he knows one G. A. Luria, now applying for registration as an American citizen; that the said G. A. Luria has been known to him for over ten years; and that the facts given in the letter No. 147 of November 10th, 1907, addressed by the said Herman Albert Loeser to me and attached hereto, are the true facts of the case of Dr. G. A. Luria, and that the opinions expressed are his conscientious opinions.

H. A. LOESER.

Sworn to and subscribed before me this 23d day of November, 1907.

JOHN H. SNODGRASS,
American Consul.

[SEAL.]

Ex. #1.
Dec. 21st/10.

34

JOHANNESBURG, November 10th, 1907.

Hon. John H. Snodgrass, American Consul, Pretoria.

DEAR COLLEAGUE: I beg to submit the following opinion with regard to the question of registering Dr. G. A. Luria of Johannesburg as an American citizen.

Dr. Luria arrived in South Africa in the same year that he was naturalized as an American citizen, namely in 1894; and has been resident here since, practicing as a physician, with the exception of a short sojourn in the United States during the last year, and has now resumed practice in Johannesburg.

Circular Instruction of April 19, 1907, re Fraudulent Naturalization says:

"When any alien who has secured naturalization of the United States shall proceed abroad within five years after his naturalization and shall take up his permanent residence in any foreign country within five years after the date of his naturalization, it shall be deemed *prima facie* evidence that he did not in good faith intend to become a citizen of the United States when he applied for naturalization, and in the absence of countervailing evidence it shall be sufficient in the proper proceedings to authorize the cancellation of his certificate of naturalization as fraudulent."

Diplomatic and Consular Officers are further instructed that "Certification under this instruction should be sent forthwith to 35 this Department, together with the certificate of naturalization of the person in interest; and pending instructions from the Department, such person's citizenship shall be considered as awaiting adjudication and he may be refused a passport or registration as a citizen of the United States."

Circular Instruction of April 19, 1907, re Expatriation says:

"When any naturalized citizen shall have resided for two years in the foreign State from which he came, or for five years in any other foreign State, it shall be presumed that he has ceased to be an American citizen, and his place of general abode shall be deemed his place of residence during the said years."

This presumption may be overcome by the presentation of certain evidence to a Diplomatic or Consular Officer.

Under the regulation last quoted it would seem that residence for five years in a foreign country, whether of a permanent nature or otherwise, would expatriate a naturalized American citizen unless countervailing evidence be presented, and Dr. Luria should be refused registration unless he presents such evidence, which, as I shall explain later, he refuses to do. But I am convinced that Dr. Luria's residence in this country for the last twelve or thirteen years has been of the nature of permanent residence, and with this opinion my two predecessors, Messrs. Gordon and Worthington, whom I have consulted, entirely concur, and I think, therefore, Dr. Luria should be considered as having expatriated himself unless he can produce evidence to the contrary.

36 As you are aware, I am entirely in concurrence with your very painstaking endeavors to retain every American citizen

as such, if he expresses a desire to retain his allegiance, and strongly inclined to accept any reasonable explanation for extended residence in this country or early departure from the United States after naturalization. We have a great many bona fide cases to deal with, where adverse circumstances and poverty has prevented naturalized Americans from returning to the country of their adoption, after having come to this country in the days of speculation, in the hope of bettering their financial condition rapidly and then again residing in the United States, and it is both your and my endeavor to treat these cases as leniently as possible. I am — opinion, however, that these considerations do not apply to Dr. Luria's case.

There has been nothing in his residence in this country that could be construed into anything but the intention of permanent residence, except the fact that he has periodically renewed his passport. It has not been a lack of means to return to the United States, for his recent visit shows that he is in a position to return. Nor have I been able to elicit from Dr. Luria that this visit constituted anything but a casual trip; on the contrary, so far as I can gather from him, although he spent some time in New York City, he made no attempt to acquire domicile there.

The position to me, then, is that Dr. G. A. Luria has transgressed both the regulation re Fraudulent Naturalization and that re Expatriation and is therefore not entitled to registration unless he over-

comes the presumptions in the manner laid down in the Circular Instructions. That is, by presenting proof establishing 37 one of the following facts:

(a) "That his residence abroad is solely as a representative of American trade or commerce etc., etc."

This he cannot do.

(b) That his residence abroad is in good faith for reasons of health or for education etc., etc."

This is out of the question.

(c) "That some unfor-seen or controlling exigency beyond his power to for-see has prevented a bona fide intention to return to the United States within the time limited by law etc."

I doubt whether Dr. Luria is able to overcome the presumption of expatriation under this clause, for the instruction goes on to say: "The evidence to overcome the presumption must be of the specific facts and circumstances which bring the alleged citizen under one of the foregoing heads, and mere assertion, even under oath, that any of the enumerated reasons exist will not be accepted as sufficient" and such specific facts and circumstances I do not think Dr. Luria can adduce. In saying this I speak with a thorough knowledge of the case. At the same time I think it is under this heading that Dr. Luria should make an affidavit and bring corroboratory evidence, so that the case can be referred to the Department of State for adjudication. Pending such adjudication I think registration should be refused.

This is the view, I think, that you also take of Dr. Luria's case

38 Hence, acting under your instructions, I wrote to Dr. Luria and asked him to kindly call at my office and make an affidavit, which with his passport and certificate of naturalization would be forwarded to the Department of State.

In reply Dr. Luria states that he considers it "infra dig. to make an affidavit in the matter of registration" and refuses to do so. He contends that, as he was issued a passport by the Department of State during his recent visit to the United States, he is entitled to registration no matter what the facts of his case are. Moreover, he states that he "was given to understand by an official of the Consular Bureau at Washington that nobody can deprive him of his rights as an American citizen, as according to the laws in force in 1894 he had and has a perfect right to stay and live wherever it suits him, etc."

If I were in your position I should most certainly refuse to register Dr. Luria and insist upon his clearing himself by an affidavit, to the correctness of which I should demand strong corroboratory evidence, and then leave the matter to the judgment of the Department.

There is, however, the further question, whether you, or I, acting on your behalf, are in a position to insist on his placing his passport and certificate of naturalization in your possession. There is no doubt in my mind, that when Luria obtained this passport, the Department was not in possession of the real facts of his case and that therefore the passport was obtained under false pretences. It seems, then, to be our duty to obtain possession of it until the Department has had the case correctly placed before it.

39 Also, the instruction re Fraudulent Naturalization says: "Certification under this instruction should be sent forthwith to this Department, together with the certificate of naturalization of the person in interest," but I am uninformed as to what our actual powers are. Does the passport and certificate of naturalization of an expatriated naturalized American citizen become the property of the Department of State and have we the right to claim and, if necessary, to seize it as such? This is a question that has cropped up not only in connection with the case under discussion and I think it would be a help to us, if the Department would more clearly define the position we are to take up. The evident object of the regulations re Registration, Expatriation, etc. will be stultified unless the diplomatic or consular officers can obtain possession of the documents certifying to American citizenship of expatriated citizens. A great deal can undoubtedly be attained by tact and bluff and I think in the Transvaal we have been fairly successful hitherto. At the same time it would be useful to know what the legal position is and to what extent one has the moral support of the Department.

I have gone rather fully into this case as I think it is a pronounced one of abuse of our naturalization laws and because I feel certain that Dr. Luria will appeal to the Department, if you act in what I consider the only way you conscientiously can and refuse to register

40 him. Under the circumstances I think the Department should have explicit information and, being most intimately associated with the local circumstances, I feel I am the best entitled to express an opinion.

Very truly yours,
(Signed)

H. A. LOESER,
American Consular Agent.

41 I, George A. Luria, a Naturalized and Loyal Citizen of the United States, hereby apply to the American Consulate at Pretoria, Transvaal, for a certificate of Registration as an American Citizen. I solemnly swear that I was born at Wilna, Russia, on the 22d day of February 1868; that I emigrated to the U. S., sailing on board the S. S. "Werra" from Bremen, Germany, on the 28th day of April, 1888; that I resided about 7 years, continuously, in the United States, from the 28th day of May 1888 to the 21st day of November 1894 at New York City; that I was naturalized as a citizen of the U. S. before the Court of Common Pleas at New York City on the 3d of July 1894; that I am domiciled in the U. S., my permanent residence therein being at New York City, in the State of New York, where I follow the occupation of physician; that I first left the U. S. for reasons of health & business on the 21st day of November 1894 and resided temporarily in the Transvaal since the 22d of December 1894 under a U. S. passport, which was renewed 3 times by the Am. Consul at Pretoria, the last time on the 6th day of February 1905 under No. 168; that since then I returned home to the U. S. and for reasons of health I left again the U. S. on the 21st day of August 1907 on board the "Teutonic," arriving at Cape Town on the 17th day of September 1907; that I am the bearer of Passport No. 36693, issued by the Secretary of State on the 26th day of June 1907; that I am now temporarily residing at Johannesburg; and that I intend to return to the United States with a purpose of residing and performing the duties of citizenship therein.

42 G. A. LURIA.

Sworn to and subscribed to before me this 15th day of November, 1907.

[SEAL.]

H. A. LOESER,
American Consular Agent.

43 NEW YORK POST GRADUATE MEDICAL
SCHOOL AND HOSPITAL.

NEW YORK, June 25, 1907.

Department of State, U. S. A., Passport Bureau, Washington, D. C.

SIR: In applying for a passport I beg to inform you that I don't intend to visit Russia, as I am proud to be a citizen of the U. S., and I don't desire to have anything to do with Russia. I intend to go to Europe, to Africa and Possibly to Egypt and desire a passport more for identification than for protection abroad being a peace-

able citizen of the United States. I am not likely to trouble the American representatives abroad. Kindly forward passport registered as requested on the application.

Yours very truly,

G. A. LURIA, M. D.

Encl. 3.

44

No. 36693.

Issued June 26, 1907.

United States of America.

STATE OF NEW YORK,
County of New York, ss:

I, George Alphonse Luria, a Naturalized and Loyal Citizen of the United States, hereby apply to the Department of State, at Washington, for a passport for myself, accompanied by my wife, and — minor children, as follows: — — born at — on the — day of — 18— and — — born at —.

I solemnly swear that I was born at Wilna, Russia on or about the 22d day of February 1868; that I emigrated to the United States, sailing on board the S. S. Werra from Bremen, on or about the 28 day of April 1888; that I resided 6 $\frac{2}{3}$ years, uninterrupted, in the United States, from 1888 to 1894 and abroad to 1907 at New York City; that I was naturalized as a citizen of the United States before the Court of Common Pleas at New York City, on the 3d day of July 1894, as shown by the accompanying Certificate of Naturalization; that I am the identical person described in said Certificate; that I am domiciled in the United States, my permanent residence being at New York City, in the State of New York where I follow the occupation of Physician; that I am about to go abroad temporarily; and that I intend to return to the United States within two years with the purpose of residing and performing the duties of citizenship therein. I am about to proceed to —.

45

Oath of Allegiance.

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely; without any mental reservation or purpose of evasion: So help me God.

G. A. LURIA.

Sworn to before me this 25 day of June 1907.

[SEAL.]

CHAS. J. BOHLEN,
Notary Public, N. Y. Co.

Description of Applicant.

Age: 39 years.
Stature: 5 feet, 8 inches, Eng.
Forehead: high.
Eyes: brown.
Nose: straight.
Mouth: small (moustache).
Chin: round.
Hair: black.
Complexion: dark.
Face: oval.

Identification.

JUNE 25, 1907.

I hereby certify that I have known the above-named G. A. Luria personally for fifteen — and know him to be the identical person referred to in the within-described Certificate of Naturalization, and that the facts stated in his affidavit are true to the best of my knowledge and belief.

MARCUS MARDFIN,
(Address of Witness.) 125 Fifth Avenue, N. Y. City.

Applicant desires passport sent to following address: Dr. Geo. A. Luria, 142 E. 19th St., N. Y. City.

46 I, John H. Snodgrass, Consul of the United States at Pretoria, Transvaal, South Africa, do hereby certify that George A. Luria was naturalized as an American citizen before the Court of Common Pleas in the City of New York on the 3rd day of July, 1894, as evidenced by his Certificate of Naturalization presented to me on this day but now in the possession of the said Luria.

That according to a statement made to me under oath the said Luria was born at Wilna, Russia, on the 22nd day of February 1868; that he emigrated to the United States on the 28th day of April 1888, and that he resided there from the 8th day of May 1888 to the 21st day of November 1894, when he proceeded to South Africa where he has continued to reside without interruption to sometime in the Spring of 1907, when he returned to the United States for the purpose of a visit, remaining a few weeks; that he again left the United States on the 21st day of August, 1907, arriving in Cape Town on the 17th day of September of the same year.

The said Luria has made application at this Consulate to be registered as an American citizen, and has requested a Certificate of naturalization, but he has been denied the privilege of registering pending instructions from the Department of State.

The said Luria resided six and one half years in the United States in the City of New York; he was naturalized on the 3rd day of July 1894, and he left his adopted country on the 21st day of November of the same year, living there but four months after receiving his

47 Certificate of naturalization: he then proceeded to Johannesburg, South Africa, where he has lived continuously engaged as a medical practitioner; his residence at Johannesburg dates from the latter part of the year 1894 to about May 1907, a period of about twelve and a half years, or about twice the length of the time he spent as a resident of the United States, and about thirty seven and a half times the length of his residence as a citizen of the United States; during the twelve and a half years of his residence in the Transvaal he has never returned to the United States, nor has he been identified in any way with America, except at stated periods he has made applications at this Consulate for a renewal of his passport in order to secure the protection given to American citizens abroad.

In order to overcome the presumption that he has ceased to be an American citizen according to Paragraph 144 of the Consular Regulations as amended by Executive Order of April 6, 1907, he has offered in evidence that his residence abroad was in good faith for reasons of health and business, and that his recent return from the United States was for reasons of health; but in that affidavit he does not aver that it is his intention eventually to return to the United States permanently to reside. His business is that of a medical practitioner, and therefore he does not represent American trade and commerce in any manner. I cannot accept his statement, as a truthful one that he came here for the purpose of regaining his health, for the deponent is a splendid specimen of physical manhood.

48 He has not offered any further evidence than that noted above for his residence abroad; his evidence is not of the specific facts and circumstances which bring the alleged citizen under one of the heads of Paragraph 144, he having merely asserted that he came to South Africa for reasons of health and business.

Furthermore, I am prepared to certify that the said Luria did not intend in good faith to become a citizen of the United States when he applied for naturalization; and under circular instruction "Reports of Fraudulent Naturalization" April 19, 1907, he should be classed with that number who secured their naturalization through fraudulent means. As he lived but six and one half years in the United States, only four months of which he was a citizen of that country, and as he has been a continuous inhabitant of Johannesburg, Transvaal, for the past twelve and a half years, I am also prepared to certify that he is a permanent resident of South Africa, and that his permanent residence was taken up within five years after his Naturalization was conferred.

I therefore recommend that the said Luria be not permitted to register, and that he be requested to hand over to me for transmission to the Department of State his Certificate of Naturalization and his Passport No. 36,693 issued by the Secretary of State on June 26, 1907.

In Witness Whereof I have hereunto subscribed my name and affixed the Seal of this Consulate on this 25th day of November, 1907.

[SEAL.]

JOHN H. SNODGRASS,
Consul for the United States of America.

49

No. 133.

Ex. #2.

Dec. 21st, '10.

UNITED STATES OF AMERICA,
DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

I certify That the document hereto annexed is a true copy from the files of this Department.*

In testimony whereof I, P. C. Knox, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name to be subscribed by the Bureau of Citizenship of the said Department, at the City of Washington, this 20 day of March, 1909.

P. C. KNOX, *Secretary of State*,
By R. W. FLOURNOY, JR.,
Chief, Bureau of Citizenship.

* For the contents of the annexed document the Department assumes no responsibility.

50

No. 65.

AMERICAN CONSULATE,
JOHANNESBURG, TRANSVAAL, February 15, 1909.

Subject: Registration of Dr. G. A. Luria, a naturalized American citizen.

The Honorable Assistant Secretary of State, Washington, D. C.

SIR: I have the honor to submit herewith for the approval of the Department a duplicate copy of certificate of registration made out in favor of Dr. G. A. Luria, a naturalized American citizen, now a practising physician of Johannesburg, and who claims to be only temporarily residing here, the chief reason for his residence abroad according to his statement being for health purposes.

According to Department instructions No. 171 of June 3, 1908 (file No. 8949/343) in reply to despatch No. 340 of April 27 last, the matter of the registration of Dr. Luria was referred to the Attorney General for appropriate action in consequence of the Act of March 2, 1907, Section 2, and no further instruction in the case has been received at this office.

Dr. Luria, who, it appears, originally came to South Africa in 1894, the same year as his naturalization as an American citizen, is the bearer of a passport No. 36693, issued by the Secretary of State on June 26, 1907, at which time he was in the United States, having gone there at that time, as he states, in good faith to reside permanently, but afterwards returning here for the benefit of his

health, and he now makes application for registration as an American citizen.

51 In view of the previous correspondence in connection with this case and owing to the fact that it has been referred to the Attorney General for action, I do not feel justified in registering Dr. Luria without more definite instructions from the Department, and I have so informed him.

In support of his declaration that his reasons for residing here are for health purposes Dr. Luria has requested me to transmit two certificates from medical practitioners here, which are enclosed.

Awaiting the Department's instructions, I have the honor to be, Sir,

Your obedient servant,

EDWARD N. GUNSAULUS, *Consul.*

Enclosures:

1. Duplicate copy of registration.
2. Two medical certificates.

52 WASHINGTON,

District of Columbia, ss:

R. W. Flournoy, Jr., Chief of the Bureau of Citizenship of the Department of State of the United States, being duly sworn, deposes and says:

That the papers hereunto appended being

Certificates of Doctor W. Stuart and Doctor J. Wright Matthews, dated August 31, 1908, and February 6, 1909, respectively, in regard to the ill health of Doctor George A. Luria, are the genuine documents received by this Department, with despatch of February 15, 1909, from the Consul at Johannesburg.

R. W. FLOURNOY, JR.

Subscribed and sworn to before me this 20th day of March, 1909.

[SEAL.]

WM. McNEIR,

Notary Public in and for the District of Columbia.

53

JOHANNESBURG, *February 6th, 1909.*

I, the undersigned, a legally qualified practitioner of medicine in Great Britain, New York and S. Africa, hereby certify that I have known Dr. G. A. Luria since his first arrival in this country on account of his health. He was under my treatment for some time, suffering from a pulmonary affection, which required a high altitude and a rarified atmosphere, such as the uplands of the Transvaal afford. He has benefited immensely from his residence here and it is, in my opinion, essential for his continued health that he should continue to reside in a warm and dry climate, such as this country affords.

J. WRIGHT MATTHEWS,
M. D.; C. M.; L. F. P. & S. Glasg. & S. D. London.

Signed before me.

[SEAL.] MAX NATHAN, *J. P.*

54

THRUPP'S BUILDING,
OPPOSITE HEATH'S HOTEL, PRITCHARD STREET,

31 AUG., '08

I hereby certify that for some years I have treated Dr. Luria for a naso-pharyngeal affection and that he is benefited by a residence in the rarified atmosphere of the uplands of S'th Africa.

W. STUART, M. D.

55-57 United States District Court, Southern District of New York.

THE UNITED STATES, Plaintiff,

against

GEORGIA A. LURIA, Defendant.

This is a suit to cancel a certificate of naturalization under section 15 of the Act of June 29, 1906.

* * * * *

58 Albert M. Friedenberg, for the defendant.
Addison S. Pratt and John N. Boyle, for the United States.

HAND. *District Judge:*

59 This case raises, and is meant to raise, only one question, the Constitutionality of Section 15 of the Act of June 29, 1906. The Act does not forfeit the defendant's right of citizenship as he supposes; it merely gives jurisdiction to the courts of naturalization to cancel a previous naturalization for fraud, or illegal procurement in its inception. "Illegally procured" means procured by subornation or some other illegal means used to impose upon the court; it does not mean that the certificate was issued through error of law. The causes upon which the suit lies are therefore, those for which any court may cancel its own judgments, and all that the act does is to give one court such a power over the proceedings of another. Since the original bestowal of jurisdiction was by Congress, this is a mere procedural regulation, no different because State Courts are included, than if the jurisdiction was wholly vested in District Courts. The substance of the relief remaining the same, i. e., proof of some original fraud or illegal means, it is no substantial invasion of the function of a court to permit the suit to be brought in another tribunal. Indeed the defendant does not assert that this makes the act unconstitutional. The real challenge is because in the suit so prescribed Congress has established one presumption and one rule of evidence.

The presumption is that evidence of the acquisition of a new domicil, i. e., "permanent residence," within five years shall be prima facie evidence of fraud. The only ground to question this is because it denies due process of law, or interferes with a judicial function. A presumption is only a rule of procedure. It provides that certain evidence shall throw upon the other side the duty of showing his hand, if he has any, or of losing his case, and that is all it does. If once the defendant puts in material evi-

60

dence of his own, then the evidence which constitutes the presumption merely takes its place as such for whatever probative force it may have, and the tribunal which judges the facts need not regard it as having any further weight than if no presumption existed. Once the issue be opened the facts are judged like any other facts. Any other rule would require some quantitative valuation of testimony which is in almost every case unknown to our law. Therefore, a presumption does not either take from the court its duty to decide upon the facts, or even take from the moving party the burden of proof, i. e., the requirement of satisfying the judgment of the tribunal of fact upon each of the essential facts which together make up the "cause of action."

Being a rule of procedure, such a presumption is within the power of a legislature, *Fong Yue Ting v. U. S.*, 149 U. S. 698, 729, *ex parte Fiske*, 113 U. S. 713, 721; even in criminal cases, *People v. Cannon*, 139 N. Y. 34, *Board of Com'r's of Excise v. Merchant*, 103 N. Y. 143, *Com. v. Williams*, 6 Gray 1, *Com. v. Rowe*, 14 Gray 47, *State v. Day*, 37 Me. 244, *State v. Sheppard*, 64 Kans. 451, *Com. v. Minor*, 88 Ky. 451. It is true that in this case the presumption applies to the trial of an issue determined by facts which occurred before the presumption existed. That is nevertheless due process of law, *Webb v. Den*, 17 How. 576, *Howard v. Moot*, 64 N. Y. 262, *Rich v. Flanders*, 39 N. H. 304. This is only a species of the general regulation of procedure which the legislature may always change even when, as in the case of criminal statutes passed by the States, it is subject to the prohibition against *ex post facto* legislation, *Hopt v. Utah*, 110 U. S. 574, *Thompson v. Missouri*, 171 U. S. 380.

61 No doubt there must be some relation in fact between the evidence constituting the presumption and the presumption itself. The evidence must be such that one may say the presumption is a reasonable inference from it, *People v. Cannon*, *supra*. Here if the period was three months, no one could question the propriety of the presumption. It must be conceded that the inference is weak of an absence of intention to become a citizen on a given date, because the applicant at the end of four years and eleven months acquires a new domicil, but that only concerns the period which Congress may fix. It is a question for large latitude and no court, certainly not a court of first instance, may say that it is so clearly beyond any reasonable relation to the fact presumed as to be merely arbitrary. A man becoming a citizen should intend to live here permanently, and if he changes within five years, I cannot say that there is no possible inference from it that he never meant to live here permanently. If he has had an actual change of intent, he can show it.

Now it is true that in this case the complaint does not tender the material issue, which should have been fraud, the change of residence being only *prima facie* proof upon that issue. As a consequence, the issue tendered is not the fact upon which the relief depends and which the United States was bound to establish to the satisfaction of the court as the ultimate fact. It can, of course, recover only *secundum allegata*, and its allegations are therefore deficient and the complaint is bad. That point, however, was not raised and

I suppose the defendant does not mean to raise it. It is only a question of pleading at best.

62 The question, however, still arises as to whether the government has established the fact that the defendant did indeed "take permanent residence" in South Africa. The words of the statute mean the "permanent residence" from which a domicil results, and upon this question some of the agreed facts bear. The defendant has now resided in South Africa for sixteen years with the exception of one interval of four or five months, during the spring and summer of the year 1907. He has there continuously practised his profession and in 1900 he served in the Boer war, presumably upon the side of the Boer republics. These facts alone justify the inference as a matter of fact that his intention was indefinitely to reside in South Africa and they do not require in corroboration the conclusion of the consul that he has taken a permanent residence there. There are no contradicting facts except the defendant's expressions of a definite desire to retain his citizenship in the United States. That however does not determine his residence, *Udny v. Udny*, L. R. 1 Sc. App. 441, despite the remarks of Lord Cranworth and Lord Kingsdown in *Moorhouse v. Lord*, 10 H. L. C. 272. His residence is determined independently of that fact, upon the factum of his physical residence in the foreign country, coupled with his intention to remain in that country for an indefinite period, which means a period not limited in his mind by any expected event except of course the expectation of all men that in time they must die.

The contradictory evidence upon his residence is as follows. First there are the sworn statements made by the defendant on August 27th, 1894, before he left the country; those made on June 29, 1899, on March 17th, 1902; on February 6th, 1905, in *Johannesburg*; and that made on June 25th, 1907, while in New York. All these statements were contained in applications for a passport and they all contain the statement either that the defendant was about to go abroad temporarily or was temporarily residing in *Johannesburg*.

63 Also they all stated that the permanent residence of the defendant is in New York City, and that he intends to return to the United States within two years. These were formal allegations upon printed forms necessary to be filled out by an applicant for a passport and they are competent evidence of his intention on the question of his domicil, *Mitchell v. U. S.*, 21 Wall. 350.

Next, is the agreed statement of fact that he originally went to South Africa "claiming that his health was impaired and that it was necessary for him to sojourn in a climate similar to that of South Africa. Next, is a statement of the American Consular Agent at *Johannesburg*, verified on the 23rd of November, 1907, in which he stated among other things that his conclusion was that the defendant had established a permanent residence in *Johannesburg*. Further there is a statement of the United States Consul at *Pretoria* stating that the defendant had offered to him an affidavit saying that his residence abroad was for reasons of health and business, but failing to state that he intended to return to the United States permanently to reside, also stating that the Consul declines to believe his statement

that he came to South Africa to regain his health, and finally stating that he has become a permanent resident of South Africa. There is a further statement on February 15, 1909, from the Consul at Johannesburg, containing annexed to it the certificate of two physicians, one of which says that he has treated the defendant for a nasopharyngeal affection, which he has benefited by his residence in the rarefied atmosphere of the uplands of South Africa, and the other of which states that he has been treated for a pulmonary affection which required a high altitude, that he had already benefited by his residence, and that it was, in the physicians' judgment, essential to his continued health that he should continue to reside in a
64 warm and dry climate such as that country afforded.

The statements of the Consular Agent and Consul are made evidence under section 15, and although of course they are not on that account conclusive, Congress has the power to make them competent evidence, and as such, the United States should be entitled to whatever probative force the tribunal in fact before whom the issue arises, may give them. Indeed, at common law, the statements of an official are admissible in evidence if they relate to acts within his personal knowledge and recorded in the performance of his duties. While it is true that this would not come within those rules, it is nevertheless of a kind somewhat similar and not without the power of Congress in the exercise of its control over the rules of procedure and evidence. The statements of the Consul, therefore, are admissible. It may be a question whether anything but his mere conclusion upon the question of permanent residence is properly admissible under the statute, but so far as his other statements are concerned, they aid the defendant, who cannot therefore complain of the addition. I shall therefore consider all the testimony before the court.

From all this evidence it is quite apparent that the defendant's statements of an intention to return within two years cannot be taken at their face value. His position is that he went to South Africa for the benefit of his health and his physicians' certificates presented by him to the Consul state that he must permanently reside in some such climate. That conclusion is inconsistent with his repeated declarations that he intended to return within two years and as a question of fact I cannot accept those declarations as true. A more reasonable inference in my judgment is that whatever may have been his intent when he originally went to South Africa, he had,

65 before this suit was brought, made up his mind for an indefinite period to remain in South Africa. It is true that his motive in going there was apparently to re-establish and maintain his health, which was affected by his residence here; and it may also be taken as true that it is essential for the continuance of his health that he should live either where he is, or in another place of a similar kind. Assuming that to be his motive the question arises as to whether that affects his intention and therefore his residence. The authorities in this respect, it must be conceded, are not clear. If the person's intention is limited to a period itself determined by some definite event, even though the occurrence of that event may be uncertain, he has not the requisite intention. This is

particularly true of a person who goes to a place for the purpose of staying until he is restored to health. Although he is unable to know just when his restoration will occur, his residence is determined by that fact which he expects to occur, and therefore he has no intention of indefinite residence. On the other hand if he does not expect to return, it is of no consequence that the reason for this is that he can never live in the country from which he came. This is the effect of *Hoskins v. Matthews*, 8 *DeG. M. & G.* 13, *Firth v. Firth*, 50 *N. J. Eq.* 137, *Att'y Gen. v. Winans*, 85 *L. T. R.* 508. In *Moorhouse v. Lord*, 10 *H. L. C.* 272, the judgment of Lord Cranworth certainly proceeds upon a different understanding of the law, but Lord Chelmsford's judgment is determined by his conclusion that the testator intended to return. The third judgment was that of Lord Kingsdown, which seems to concur with that of Lord Cranworth, although the case which he mentions is that of a man laboring under a mortal disease. This, too, was the fact in *Dupuy v. Wurtz*, 53 *N. Y.* 556, in spite of some expressions which seem

66 & 67 to indicate a confusion between an intent to reside and an intent to change one's citizenship. The case of one stricken with a mortal illness, who goes to some other place to die, is analogous to that of one who goes to a place with the intention of staying there only until his health was restored, in spite of the fact that the expected outcome is just the opposite, for the residence in each case is limited by an expected event which although uncertain in time will be controlled by existing facts which the person knows, or supposes he knows, to exist. In spite of the disagreement of authorities the statement of Mr. Dicey on p. 143-146 of his *Conflict of Laws* (1896) seems to me the best statement of the law and the only one which can stand on principle. If so, it is quite apparent that the defendant's health may be disregarded as a factor in his intent, however much it may be a motive for his conduct. I therefore conclude that the government has established the fact that he is permanently residing in South Africa.

There remains only the question of the right to a jury trial. The issue is of fraud; the relief is to vacate the order of a court; call it judgment or what one will. That issue and that relief have from time immemorial been granted in courts of equity and are equitable in character, if anything can be. A suit based upon that issue is not within the constitutional requirement of a trial by jury, *U. S. v. Mansour*, 170 *Fed. R.* 671.

Let a decree pass cancelling the certificate of the defendant.

N. Y., Feb'y, 1911.

LEARNED HAND, U. S. D. J.

- 68 At a Stated Term of the United States District Court for the Southern District of New York, Held in and for the Circuit and District Aforesaid at the United States Court House and Post Office Building in the Borough of Manhattan, City of New York, on the 2 Day of March, in the Year of Our Lord One Thousand Nine Hundred and Eleven.

Present: The Honorable Learned Hand, Judge.

UNITED STATES, Plaintiff,
vs.
GEORGE A. LURIA, Defendant.

This cause having come on to be further heard at this term of court, and having been argued by counsel, thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that the order and decree of the Court of Common Pleas for the City and County of New York, dated July 3, 1894, admitting the defendant to be and become a citizen of the United States of America be, and the same hereby is, set aside and for naught held and esteemed, and that the certificate of citizenship aforesaid issued to the defendant therein be cancelled as fraudulent and illegally secured, and that the defendant forthwith surrender the same into this Court for cancellation, and that the defendant be, and he hereby is, forever enjoined and restrained from setting up or claiming any rights, privileges, benefits or advantages whatsoever under the said order and decree or certificate; and it was further

69 Ordered that the Clerk of this Court transmit a certified copy of the foregoing decree, as well as the said certificate (if surrendered) to the Bureau of Immigration and Naturalization of the Department of Commerce and Labor of the United States at Washington, D. C., and that he also transmit a certified copy of the foregoing decree to the Clerk of the Court of Common Pleas for the City and County of New York at New York City, N. Y., and it was further

Ordered that the plaintiff recover its costs of the defendant to be taxed by the Clerk of this Court and amounting as taxed to the sum of \$84.05, and that the plaintiff have execution therefor.

LEARNED HAND, U. S. J.

- 70 [Endorsed:] Form No. 336. U. S. District Court, Southern District of New York. United States, Plaintiff, versus George A. Luria, Defendant. Final decree cancelling certificate of naturalization with notice of settlement. Henry A. Wise, United States Attorney, Attorney for U. S. To Albert M. Friedenberg, Esq., Attorney for Def't, 38 Park Row, N. Y. City. Rec'd Feb. 28, 1911, gave adm. Filed March 2d, 1911.

71 United States District Court, Southern District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,
against
GEORGE A. LURIA, Defendant.

The defendant prays for an appeal from the final decree of this Court to the Supreme Court of the United States, and assigns for error:

First. That this Court erred in refusing to decide and hold that Section 15 of the Act of Congress passed June 29, 1906, entitled "An Act to establish a bureau of Immigration and Naturalization and to provide for a uniform rule for the naturalization of aliens throughout the United States," in so far as the same purports to permit the cancellation of the certificate of naturalization issued to the defendant in proceedings instituted in the Court of Common Pleas of the City and County of New York and which resulted on July 3, 1894, in his naturalization as a citizen of the United States, is unconstitutional and void in that it violates (a) Article I, Section 8 of the Constitution of the United States, which provides that Congress shall have power to establish a uniform rule of naturalization, and pursuant to which the defendant became duly naturalized prior to the passage of said act; (b) Section 1 of the Fourteenth Amendment of the Constitution of The United States, which provides that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and that said Act passed subsequent to the defendant's naturalization

72 could not lawfully deprive the defendant of his rights of citizenship theretofore acquired.

Second. That this Court erred in refusing to decide and hold that Section 15 of the aforesaid Act of June 29, 1906, is unconstitutional and void in that it undertook to take away the right of citizenship theretofore lawfully acquired by the defendant.

Third. That this Court erred in refusing to decide and hold that Section 15 of the aforesaid Act of June 29, 1906, is unconstitutional and void in that by depriving the defendant of his right of citizenship because of his alleged permanent residence in a foreign country subsequent to his naturalization and within five years after the issuance of his certificate of naturalization it is in effect a bill of attainder in violation of Article I, Section 9 of the Constitution of the United States.

Fourth. That this Court erred in refusing to decide and hold that Section 15 of the aforesaid Act of June 29, 1906, is unconstitutional and void in that by depriving the defendant of his right of citizenship because of his alleged permanent residence in a foreign country subsequent to his naturalization and within five years after the issuance of his certificate of naturalization, it is in effect an ex post facto law in violation of Article I, section 9 of the Constitution of the United States.

Fifth. That this Court erred in failing to decide and hold that

Section 15 of the aforesaid Act of June 29, 1906, is an illegal and unconstitutional attempt on the part of Congress to permit this Court to nullify the decree of the Court of Common Pleas of the City and County of New York which lawfully issued to the defendant his certificate of naturalization substantially twelve years prior to the passage of said Act, on grounds not existing at the time of the rendition of said decree.

73 Sixth. That this Court erred in refusing to decide and hold that the defendant was entitled to a trial by jury of the issues presented by the pleadings in this cause, pursuant to the Seventh Amendment to the Constitution of the United States.

Seventh. That this Court erred in refusing to decide and hold that Section 15 of the aforesaid Act of June 29, 1906, is applicable only to certificates of naturalization issued subsequent to the passage of said act and does not affect the certificate of citizenship issued to the defendant pursuant to a previous act of Congress.

Eighth. That this Court erred in refusing to decide and hold that there is nothing in the facts disclosed by the record in this cause justifying the cancellation of his certificate of citizenship procured by him prior to the passage of the aforesaid Act of June 29, 1906, on the ground that such certificate had been illegally procured.

Ninth. That this Court erred in rendering a decree setting aside and cancelling the certificate of citizenship issued to the defendant by the Court of Common Pleas of the City and County of New York on July 3, 1894, and vacating the order upon which such certificate was issued.

Tenth. That this Court erred in deciding and holding that Section 15 of the aforesaid Act of June 29, 1906, does not deny to the defendant due process of law.

74 Eleventh. That this Court erred in deciding and holding that Section 15 of the aforesaid Act of June 29, 1906, is valid although it purported to create a presumption for the determination of facts which occurred substantially twelve years prior to the passage of said Act by the application of a rule of conduct which had no existence at the time when the defendant applied for naturalization under the act of Congress then in force.

Twelfth. That this Court erred in deciding and holding that a person becoming a citizen under the law which existed on July 3, 1894, could be deprived of his right of citizenship by the fact of his change of residence within five years thereafter, although no law existed until substantially twelve years after he became a citizen, which in any way attempted to affect his residence subsequent to his becoming a naturalized citizen of the United States.

Thirteenth. That this Court erred in deciding and holding that the plaintiff was entitled to the decree rendered, although the complaint in this cause contained no allegation of fraud or of illegal conduct on the part of the defendant in procuring his certificate of citizenship.

Fourteenth. That this Court erred in deciding and holding that Section 15 of the aforesaid Act of June 29, 1906, is applicable to a

proceeding for the cancellation of a certificate of citizenship which had been conferred under previous legislation.

Fifteenth. That this Court erred in deciding and holding that the plaintiff was entitled to the decree prayed for herein 75 although there was no evidence that the defendant was guilty of any fraud or illegal conduct in procuring the issuance to him of his certificate of naturalization.

Sixteenth. That this Court erred in deciding and holding that the facts established in this cause justify an inference that it was the defendant's intention indefinitely to reside in South Africa.

Seventeenth. That this Court erred in deciding and holding that the plaintiff is entitled to the decree rendered herein upon the ground that "whatever may have been the defendant's intent when he originally went to South Africa, he had before this suit was brought made up his mind for an indefinite period to remain in South Africa."

Eighteenth. That this Court erred in deciding and holding that the defendant's health was to be disregarded as a factor of the intent governing his sojourn in South Africa.

Nineteenth. That this Court erred in deciding and holding that the plaintiff has established the fact that the defendant is permanently residing in South Africa.

Twentieth. That this Court erred in deciding and holding that the report of H. Elbert Loeser, the United States Consul General at Johannesburg, South Africa, and of John H. Snodgrass, the United States Consul at Pretoria, South Africa, thereto annexed, and of Edward N. Gunsaulus, Consul of the United States at Johannesburg, South Africa, and the letters thereto attached of Dr. W. Stewart and Dr. J. Wright Matthews, which were offered in evidence by the plaintiff, under the defendant's objection, were admissible as evidence in this cause.

Twenty-first. That this Court erred in deciding and holding that the defendant was not entitled to a trial by jury of 76 the issues joined herein.

Wherefore the defendant prays that the decree of the United States District Court for the Southern District of New York, entered in this cause, may be reversed, annulled and held for naught and that he may have such other relief as may be proper in the premises.

ALBERT M. FRIEDENBERG,
Attorney for Defendant.

Office and Post Office Address: 38 Park Row, Borough of Manhattan, New York City.

LOUIS MARSHALL,
Of Counsel.

Endorsed: Assignment of Error filed March 3, 1911.

77 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
against
GEORGE A. LURIA, Defendant.

And now comes the defendant in the above entitled action, conceiving himself aggrieved by the decree heretofore made and entered by this Court, cancelling the decree of the Court of Common Pleas for the City and County of New York, dated and entered the 3rd day of July, 1894, admitting the defendant to be and become a citizen of the United States, and the certificate issued thereon, and having filed with the Clerk his assignment of errors and desiring to appeal from said decree to the Supreme Court of the United States for the reasons specified in said assignment of errors, prays this Court to allow an appeal to the Supreme Court of the United States from the said decree, and that a certified transcript of the record upon which said decree was made be transmitted to the said Court.

Dated New York, March 3, 1911.

ALBERT M. FRIEDENBERG,
Solicitor for the Defendant.

Office and Post Office Address: 38 Park Row, Manhattan, New York City.

77a United States District Court, Southern District of New York

UNITED STATES OF AMERICA, Plaintiff,
against
GEORGE A. LURIA, Defendant.

The above named defendant, George A. Luria, having presented his petition asking leave to appeal to the Supreme Court of the United States from the decree entered in this action on the 2d day of March, 1911, cancelling the decree of the Court of Common Pleas for the City and County of New York, dated and entered the 3rd day of July, 1894, admitting the defendant to be and become a citizen of the United States, and the certificate issued thereon,

Now, on motion of Albert M. Friedenberg, solicitor and of Counsel for the defendant, it is

Ordered, that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein cancelling the decree and order of the Court of Common Pleas for the City and County of New York, dated and entered the 3rd day of July, 1894, admitting the defendant to be and become a citizen of the United States, and the certificate issued thereon, be and the same hereby is allowed and that the certified transcript of the record of all proceedings herein duly authenticated be forthwith transmitted to the Supreme Court of the United States, and it is further

Ordered, that the bond on appeal be fixed at the sum of Two Hundred and Fifty dollars, as a bond for costs and damages on appeal.

And I, Learned Hand, one of the Judges of the District Court of the United States for the Southern District of New York, do hereby certify that upon the hearing of the above cause the construction, application and constitutionality of Section 15 of the Act of 78 Congress of June 29, 1906 was fairly raised by the complaint and answer herein, was argued at the trial of the issues thereby joined and was determined by the Court.

Dated New York, March 3, 1911.

LEARNED HAND, *U. S. D. J.*

Endorsed: Petition for and order allowing appeal filed March 4, 1911.

79 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
against
GEORGE A. LURIA, Defendant.

It is hereby stipulated and agreed, by and between the parties to the above entitled action by their respective attorneys, that the record on appeal herein by the defendant to the Supreme Court of the United States from the decree entered herein on the 2d day of March, 1911, shall be deemed complete without the inclusion therein of the affidavit and order for the publication of the *præcipe* in this action, and of paragraphs numbered 1 to 17 inclusive, being the statement of facts herein, as contained in the opinion of Hand, District Judge, herein, and that the foregoing be omitted by the Clerk of this Court from the certified transcript of the record herein to the Supreme Court of the United States.

Dated New York, March 4, 1911.

HENRY A. WISE, *U. S. Attorney.*
ALBERT M. FRIEDENBERG,
Attorney for the Defendant.

Endorsed: Stipulation filed March 4, 1911.

79a The President of the United States of America to the United States of America and Henry A. Wise, U. S. Attorney for the Southern District of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington, District of Columbia, within thirty (30) days from the date of this writ pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein the United States of America is plaintiff and George

A. Luria is defendant, and you are to show cause if any there be why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness: The Honorable Edward Douglass White, Chief Justice of the United States, this 3rd day of March, 1911, and the independence of the United States the one hundred and thirty-fifth.

LEARNED HAND,
U. S. District Judge.

Due service of the foregoing citation on appeal is hereby admitted this 4th day of March, 1911.

UNITED STATES OF AMERICA,
By HENRY A. WISE, *U. S. Attorney.*

Endorsed: Citation on Appeal filed March 4, 1911.

80 Approved
ADDISON S. PRATT,
Asst U. S. Att'y.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA
against
GEORGE A. LURIA.

Know all men by these presents

That I, Herbert Friedenwald, of the Borough of Manhattan, City, County and State of New York, am held and firmly bound unto the above named United States of America in the sum of Two hundred and fifty dollars (\$250), to be paid to the said United States of America, for the payment of which well and truly to be made I bind myself, my heirs, executors and administrators, firmly by these presents.

Sealed with my seal and dated the 6th day of March in the year of our Lord one thousand nine hundred and eleven.

Whereas, the above named George A. Luria has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled cause by the Judge of the District Court of the United States for the Southern District of New York;

Now, therefore the condition of this obligation is such that if the above named George A. Luria shall prosecute said appeal to effect and answer all damages and costs, if he fail to make good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

81 HERBERT FRIEDENWALD. [SEAL.]

Sealed and delivered and taken and acknowledged the 6th day of March, 1911, before me

[SEAL.]

LOUIS COHEN,
Notary Public, New York County.

82 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Herbert Friedenwald, being duly sworn, depose and say:
I reside at No. 58 Central Park West in the Borough of Manhattan, City, County and State of New York, and am a householder and am worth the sum of Five hundred dollars (\$500) over and above all my just debts and liabilities.

HERBERT FIEDENWALD.

Sworn to before me this 6th day of March, 1911.

[SEAL.]

LOUIS COHEN,
Notary Public, New York County.

R. B.

[Endorsed:] United States District Court, Southern District of New York. United States of America against George A. Luria. Bond for damages and costs. The within bond is hereby approved. Dated, March 6th, 1911. Learned Hand, U. S. District Judge.

83 UNITED STATES OF AMERICA,
Southern District of New York, ss:

UNITED STATES OF AMERICA, Plaintiff-Appellee,
vs.
GEORGE A. LURIA, Defendant-Appellant.

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled matter.

In Testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this ninth day of March in the year of our Lord one thousand nine hundred and eleven and of the Independence of the said United States the one hundred and thirty-fifth.

[Seal District Court of the United States, Southern District
of N. Y.]

THOS. ALEXANDER, *Clerk.*

The clerk's fees for this record are \$27.50.

— — —, *Clerk.*

84 [Endorsed:] U. S. District Court, Southern District of New York. The United States of America, Plaintiff-Appellee, vs. George A. Luria, Defendant-Appellant. Record on appeal. Endorsed on cover: File No. 22,575. S. New York D. C. U. S. Term No. 954. George A. Luria, appellant, vs. The United States. Filed March 14th, 1911. File No. 22,575.



2
Office Supreme Court, U. S.
FILED.

SEP 26 1911

JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. ~~26~~ 27

GEORGE H. LURIA,
Appellant,

against

THE UNITED STATES,
Appellee.

Appeal from
the District
Court of the
United States
for the South-
ern District of
New York.

2

3

PLEASE TAKE NOTICE that on the record in this cause and on the annexed affidavit of Louis Marshall, verified September 12, 1911, a motion will be made before this court, at the Capitol in the City of Washington, D. C., on Monday, October 9, 1911, at twelve o'clock noon, or as soon thereafter as counsel can be heard, for an order advancing this cause for an early hearing, on the ground that it involves the constitutionality of an act of Congress and a public question of great importance.

Dated, New York, September 12, 1911.

Yours, &c.,

LOUIS MARSHALL,
Appellant's Counsel.

To the Attorney General,
Washington, D. C.

4 SUPREME COURT OF THE UNITED
STATES,

OCTOBER TERM, 1911.

No.

GEORGE H. LURIA,
Appellant,

against

5 THE UNITED STATES,
Appellee.

UNITED STATES OF AMERICA,
Southern District of New York, ss.;
County of New York,

LOUIS MARSHALL, being duly sworn, deposes and says: I am the counsel for the appellant herein. This action was brought under Section 15 of the Naturalization Act of June 29, 1906, to set aside and cancel the certificate of citizenship duly granted to the appellant on July 3, 1894, by an order of the Court of Common Pleas of the City and County of New York, the ground of such application being that the appellant departed from the United States within a period of five years after he had become a citizen, and has now established a permanent residence in the City of Johannesburg, South Africa.

The appellant denies that he has established such permanent residence, but alleges that after he had become a citizen of the United States he

went to South Africa temporarily, for the purpose of promoting his health, returning to the United States in 1907, but again returning to South Africa temporarily.

7

The appellant, as a further defence, urged that Section 15 of the Naturalization Act is unconstitutional, in that it violates Article XIV, Section 1, of the Amendments to the Constitution of the United States of America, which declares that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside, and that it is further unconstitutional in that it violates Article I, Section 9, of the Constitution of the United States, by seeking to impose a penalty and forfeiture on the appellant for absenting himself from the United States subsequent to his becoming a citizen thereof, by an *ex post facto* law, and by imposing upon him pains and penalties by means of a bill of attainder.

8

On the trial, which took place before Hon. Learned Hand, United States District Judge, the court decreed the cancellation of the appellant's certificate of citizenship.

The facts are undisputed and are set forth in the stipulation appearing at pages 4-7 of the Record.

9

In the opinion rendered, which appears at pages 29-33 of the Record, the court held that the act was not unconstitutional, although it was passed twelve years after the appellant had become a citizen of the United States, and more than eleven years after he had temporarily removed to South Africa on account of his health.

The Assignments of Error, which appear at pages 35-37 of the Record, indicate the great importance and seriousness of the questions pre-

10 sented by the record. The case has been treated as a test case and upon its determination will depend, as I am informed, the status as citizens of the United States of thousands of persons who became naturalized citizens prior to the passage of the Naturalization Act of June 29, 1906, who subsequently went abroad and who for various reasons have absented themselves from the United States for a number of years.

11 It is therefore important that the validity and applicability of this act be determined by this Court at an early day, to the end not only that the status of the appellant in the present case be adjudicated, but also that many others who are in a similar plight may be enabled to determine whether or not they have forfeited their rights as American citizens by the fact that they have absented themselves, for legitimate reasons, from the United States within five years after they had become citizens thereof.

Wherefore this Court is respectfully requested to grant an order setting this case for hearing on a day prior to January, 1912.

LOUIS MARSHALL.

12 Subscribed and sworn to before me
this 12th day of September, 1911.]

EDWARD M. NEARY,
Notary Public, Kings County,
Certificate filed in New York County.
(NOTARIAL SEAL.)

Due, timely and proper service of the foregoing affidavit and notice of motion is hereby admitted,
this 13th day of September, 1911.

William R. Harr.
GEORGE W. WICKERSHAM,
Acting Attorney General.

3

Office Supreme Court, U. S.
FILED.

JAN 28 1913

JAMES H. MCKENNEY,

CLERK.

Supreme Court of the United States,

October Term, 1912.

No. **27**

GEORGE A. LURIA,

Appellant,

against

THE UNITED STATES.

APPELLANT'S ARGUMENT.

LOUIS MARSHALL,
A. M. FRIEDENBERG,

Appellant's Counsel.



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Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 248.

GEORGE A. LURIA,
Appellant,

against

THE UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

NATURE OF THE ACTION.

This action was brought by virtue of Section 15 of the Naturalization Act of June 29, 1906, to cancel the appellant's certificate of citizenship and to vacate the original order upon which the same was issued, on the allegation that, on July 3, 1894, the appellant was, by an order of the Court of Common Pleas of the City and County of New York, admitted to be a citizen of the United States of

America, that a certificate of such citizenship was thereupon issued to him, and that he departed from the United States within a period of five years thereafter, and had at the time of the commencement of this action established a permanent residence in the City of Johannesburg, South Africa, and did not then reside in the United States (*Rec. pp. 1, 2*).

The appellant denied the allegation that he was not a resident of the United States and that he had established a permanent residence in the City of Johannesburg, and alleged that on November 21, 1894, he went to South Africa temporarily for the purpose of promoting his health; that he returned to the United States in the spring of 1907, and about August 21, 1907, he again proceeded to South Africa temporarily on account of his health, and that he intends to and will shortly return to the United States for the purpose of performing the duties of citizenship therein and to continue his residence there.

It is further alleged that Section 15 of the Naturalization Act is unconstitutional, because it violates Article XIV, Section 1, of the Amendments to, and Article I, Section 9, of the Constitution of the United States. (*See pp. 2, 3*).

THE STIPULATED FACTS.

The facts are admitted by stipulation, and are as follows:

The appellant was born in Wilna, Russia, on February 22, 1868. He arrived as an immigrant at the port of New York on May 8, 1888. On May 7, 1889, he matriculated as a medical student at

the medical college of the New York University in the City of New York, and attended the college during the sessions of 1889-1893, receiving his medical degree on April 4, 1893. On June 30, 1892, he declared his intention to become a citizen of the United States in due form, and on July 3, 1894, he was duly admitted to citizenship in compliance with the terms of the statute as then in force. During 1894, and for some time prior thereto, he owned a drug-store at No. 482 Sixth Avenue in the City of Brooklyn, New York, which he sold on or about October 24, 1894. On June 19, 1893, he applied for membership to the New York County Medical Association. On August 27, 1894, he applied to the Department of State for a passport, and on August 29, 1894, secured such passport. On November 21, 1894, he left the United States, and arrived at the Transvaal, South Africa, about December 22, 1894. He sojourned in the City of Johannesburg, South Africa, continuously from December 22, 1894, to some time in the spring of 1907, claiming that his health was impaired, and that it was consequently necessary for him to sojourn in a climate similar to that of South Africa, and during that time he practiced his profession as a physician in the City of Johannesburg, joining the South African Medical Association and serving in the Boer War. In 1894 and 1907 he applied to the United States Consular Office at Pretoria and Johannesburg, on three several occasions, for passports, which were issued to him. In the spring of 1907 he returned to the United States and remained there until about August 21, 1907. During part of that time he attended a six weeks' medical course at the Post Graduate Medical School and Hospital in

the City of New York. On June 26, 1907, a passport was issued to him by the Department of State. On his return to the Transvaal he continued to sojourn there and to practice his profession as a physician in order to earn his livelihood, he having no other profession or business (*Rec. pp. 4-6*). In all of his applications for passports, he stated the facts relative to his naturalization, and indicated it to be his intention to return to the United States. (*Rec. pp. 11-17*.)

THE REPORTS OF THE AMERICAN CONSULAR AGENTS.

The appellee, subject to objection and exception, introduced reports of H. Elbert Loeser, American Consular Agent at Johannesburg, and John H. Snodgrass, United States Consul at Pretoria, with the several letters attached. (*Rec. pp. 18-29*).

Although the appellant claimed that these documents are incompetent as applied to his naturalization, yet from the only statement of facts which they contain it appears that appellant's sojourn in the Transvaal was for the purpose of promoting his impaired health. One of the documents attached to these reports was a certificate of Dr. Matthews, to the effect that he had known the appellant since his first arrival at Johannesburg; that he had been under his treatment for some time, suffering from a pulmonary affection, which required a high altitude and a rarefied atmosphere such as the uplands of the Transvaal afford; that he had benefited immensely from his residence there, and it was in his opinion, essential for his continued health that

he should continue to reside in a warm and dry climate like that of the Transvaal. (*Rec. p. 28.*) Dr. Stuart also certified, that he had for some years treated the appellant for a naso-pharyngeal affection and that he had been benefited by a residence in the rarefied atmosphere of the uplands of South Africa. (*Rec. p. 29.*)

There was no testimony to the contrary, the elaborate arguments of the Consular Agents which were introduced in evidence, containing no statement of fact, being in each instance a layman's disquisition on international law.

PROCEEDINGS AT THE TRIAL.

At the opening of the trial the appellant demanded a trial by jury. This request was overruled, and the appellant excepted. Thereupon the stipulation as to the facts was read in evidence, the official reports were admitted subject to objection and exception, and the appellant moved for a dismissal of the complaint on the following grounds:

- (1) Because the act has no application to the naturalization secured by the defendant in this case under the law which was enacted previous to 1906, he not having been naturalized by the law under which these proceedings are brought.
- (2) There is nothing in the facts disclosed by the record showing that the defendant was guilty of fraud in procuring his certificate of citizenship, or that such certificate was illegally procured.
- (3) In so far as the act assumes to deprive defendant of the citizenship procured by him un-

der the decree of a court of competent jurisdiction in 1894, it is unconstitutional, in that it violates Article I, Section 8, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

(4) The alleged legislation violates Article I, Section 9, of the Federal Constitution, because it is in effect a bill of attainder, and an *ex post facto* law.

(5) The legislation is unconstitutional, because it is an attempt on the part of Congress to nullify the decree of the Court which issued to the defendant his certificate of naturalization.

The appellant's motion was denied, and he duly excepted. (*Rec. pp. 18, 19.*)

On these facts the Court rendered a decree cancelling as fraudulent and illegally secured, the order of the Court of Common Pleas of the City and County of New York, dated July 3, 1894, admitting the appellant to citizenship, and requiring the appellant forthwith to surrender the same into Court for cancellation, and restraining him from setting up or claiming any rights, privileges, benefits or advantages whatsoever, under the order, decree and certificate admitting him to citizenship.

THE ACT HERE INVOLVED.

The statute upon which the proceedings now sought to be reviewed (Act of June 29, 1906, Ch. 3592, 34 Stat. L. 596), is entitled:

“An act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform

rule for the naturalization of aliens throughout the United States."

The section relied upon reads:

"Sec. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefore, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship *on the ground of fraud or on the ground that such certificate of citizenship was illegally procured*. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

If any alien who shall have secured a certificate of citizenship under the provisions of this Act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence

in all courts in proceedings to cancel certificates of citizenship.

Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Immigration and Naturalization of such cancellation.

The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceeding under prior laws."

(34 Stat. L. 601.)

THE TEXT OF THE ACT OF MARCH 2, 1907.

The Government incidentally refers to a kindred act (Act of March 2, 1907, Ch. 2534, 34 St. L. 1228) entitled:

"An act in reference to the expatriation of citizens and their protection abroad."

which reads:

"Sec. 1. That the Secretary of State shall be authorized, in his discretion, to issue passports to persons not citizens of the United States as follows: Where any person has made a declaration of intention to become such citizen as provided by law and has resided in the United States for three years a passport may be issued to him entitling him to the protection of the Government in any foreign country; Pro-

vided, That such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this Government in the country of which he was a citizen prior to making such declaration. (34 Stat. L. 1228.)

“See. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state. When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war.” (34 Stat. L. 1228.)

The appellant prayed an appeal to this Court, which was duly allowed on the Assignments of Error set forth at *pages 35-37* of the *Record*, those which are to be considered on this appeal being the following:

ASSIGNMENTS OF ERROR.

First.—That the Court erred in refusing to decide and hold that Section 15 of the Act of Congress passed June 29, 1906, entitled “An Act to establish a Bureau of Immigration and Naturalization and to provide for a uniform rule for the naturalization of aliens throughout the United States,” in so far as the same purports to permit the cancellation of the certificate of naturalization issued to the defendant in proceedings instituted in the Court of Common Pleas of the

City and County of New York and which resulted on July 3, 1894, in his naturalization as a citizen of the United States, is unconstitutional and void in that it violates (a) Article I, Section 8 of the Constitution of the United States which provides that Congress shall have power to establish a uniform rule of naturalization, and pursuant to which the defendant became duly naturalized prior to the passage of said act; (b) Section 1 of the Fourteenth Amendment of the Constitution of the United States, which provides that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and that said Act passed subsequent to the defendant's naturalization could not lawfully deprive the defendant of his rights of citizenship theretofore acquired.

Second.—That the Court erred in refusing to decide and hold that Section 15 of the aforesaid Act of June 29, 1906, is unconstitutional and void in that it undertook to take away the right of citizenship theretofore lawfully acquired by the defendant.

Third.—That the Court erred in refusing to decide and hold that Section 15 of the aforesaid Act of June 29, 1906, is unconstitutional and void in that by depriving the defendant of his right of citizenship because of his alleged permanent residence in a foreign country subsequent to his naturalization and within five years after the issuance of his certificate of naturalization, it is in effect a bill of attainder in violation of Article I, Section 9, of the Constitution of the United States.

Fourth.—That the Court erred in refusing to decide and hold that Section 15 of the aforesaid Act of June 29, 1906, is unconstitutional and void, in that by depriving the defendant of his right of citizenship because of his alleged permanent residence in a foreign country, subsequent to his naturalization, and within five years after the issuance of his certificate of naturalization, it is in effect an *ex post facto* law in violation of Article I, Section 9, of the Constitution of the United States.

Fifth.—That the Court erred in failing to decide and hold that Section 15 of the aforesaid Act of June 29, 1906, is an illegal and unconstitutional attempt on the part of Congress to permit this Court to nullify the decree of the Court of Common Pleas of the City and County of New York which lawfully issued to the defendant his certificate of naturalization substantially twelve years prior to the passage of said Act, on grounds not existing at the time of the rendition of said decree.

Sixth.—That the Court erred in refusing to decide and hold that the defendant was entitled to a trial by jury of the issues presented by the pleadings in this cause, pursuant to the Seventh Amendment to the Constitution of the United States and in holding that he was not entitled to such trial.

Seventh.—That the Court erred in refusing to decide and hold that Section 15 of the Act of June 29, 1906, is applicable only to certificates of naturalization issued subsequent to the passage of

said act and does not affect the certificate of citizenship issued to the defendant pursuant to a previous act of Congress.

Eighth.—That the Court erred in refusing to decide and hold that here is nothing in the facts disclosed by the record in this cause justifying the cancellation of his certificate of citizenship procured by him prior to the passage of the aforesaid Act of June 29, 1906, on the ground that such certificate had been illegally procured.

Ninth.—That the Court erred in rendering a decree setting aside and cancelling the certificate of citizenship issued to the defendant by the Court of Common Pleas of the City and County of New York on July 3, 1894, and vacating the order upon which such certificate was issued.

Tenth.—That the Court erred in deciding and holding that Section 15 of the aforesaid Act of June 29, 1906, does not deny to the defendant due process of law.

Eleventh.—That the Court erred in deciding and holding that Section 15 of the aforesaid Act of June 29, 1906, is valid although it purported to create a presumption for the determination of facts which occurred substantially twelve years prior to the passage of said Act by the application of a rule of conduct which had no existence at the time when the defendant applied for naturalization under the act of Congress then in force.

Twelfth.—That the Court erred in deciding and holding that a person becoming a citizen un-

der the law which existed on July 3, 1894, could be deprived of his right of citizenship by the fact of his change of residence within five years thereafter, although no law existed until substantially twelve years after he became a citizen, which in any way attempted to affect his residence subsequent to his becoming a naturalized citizen of the United States.

Thirteenth.—That the Court erred in deciding and holding that the plaintiff was entitled to the decree rendered, although the complaint in this cause contained no allegation of fraud or of illegal conduct on the part of the defendant in procuring his certificate of citizenship.

Fourteenth.—That the Court erred in deciding and holding that section 15 of the Act of June 29, 1906, is applicable to a proceeding for the cancellation of a certificate of citizenship, which had been conferred under previous legislation.

Fifteenth.—That the Court erred in deciding and holding that the plaintiff was entitled to the decree prayed for herein although there was no evidence that the defendant was guilty of any fraud or illegal conduct in procuring the issuance to him of his certificate of naturalization.

Sixteenth.—That the Court erred in deciding and holding that the facts established in this cause justify an inference that it was the defendant's intention indefinitely to reside in South Africa.

Seventeenth.—That this Court erred in deciding and holding that the plaintiff is entitled to

the decree rendered herein upon the ground that "whatever may have been the defendant's intent when he originally went to South Africa, he had before this suit was brought made up his mind for an indefinite period to remain in South Africa."

Eighteenth.—That this Court erred in deciding and holding that the defendant's health was to be disregarded as a factor of the intent governing his sojourn in South Africa.

Nineteenth.—That this Court erred in deciding and holding that the plaintiff has established the fact that the defendant is permanently residing in South Africa.

POINTS.**I.**

In so far as the Act of 1906 assumes, (though we claim that it does not,) to deprive the appellant of the citizenship lawfully and without fraud secured by him in 1894, by the decree of a court of competent jurisdiction, twelve years before the passage of that act, it is unconstitutional, in that it violates Article I, Section 8, of the Constitution of the United States, and Section 1 of the Fourteenth Amendment thereto.

(1) The Constitutional Provisions Relating to Citizenship, as Interpreted.

Article I, Section 8, provides:

"The Congress shall have power * * * to establish an uniform rule of naturalization."

Section 1 of the Fourteenth Amendment provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

For purposes of citizenship, persons born and persons naturalized in the United States are placed on an exact equality by the Constitution.

As was said by Chief Justice WAITE, in *Minor v. Happersett*, 21 Wall. 162, 165:

"There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

"For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words 'subject,' 'inhabitant,' and 'citizen' have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more. * * *

"Whoever, then, was one of the people of either of these States when the Constitution of the United States was adopted, became *ipso facto* a citizen—a member of the nation created by its adoption. He was one of the persons associating together to form the nation, and was, consequently, one of its original citizens. * * * Additions might always be made to the citizenship of the United States in two ways: first, by birth, and second, by naturalization. This is apparent from the Constitution itself, for it provides that 'no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President' (Article 1, §8), and that Congress shall have power 'to establish a uniform rule of naturalization.' Thus new citizens may be born or they may be created by naturalization.

"The constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to

ascertain that. At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners."

See also:

United States v. Cruikshank, 92 U. S. 542.
Lynch v. Clarke, 1 Sandf. Ch. 641, 642.
Dred Scott v. Sandford, 19 How. 393.

Chief Justice Fuller defined naturalization, in *Boyd v. Thayer*, 143 U. S. 162, as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen."

As defined in the Century Dictionary, "to naturalize" means, "to reduce to a state of nature; to identify with or make a part of nature; to confer the rights and privileges of a natural subject or citizen upon; to receive or adopt as native, natural or vernacular."

In this sense a recent author has said:

"* * * Naturalization is to have a retroactive effect, in that it makes the person naturalized, to all intents and purposes, a citizen *de natura*." (Henriques on The Jews in the English Law, 1908, p. 237.)

The only distinction between citizenship by birth and citizenship by naturalization, is that marked by the provisions of the Constitution, by which "no person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President."

In *Elk v. Wilkins*, 112 U. S. 94, 101, Mr. Justice GRAY, in substantiation of this proposition, said:

"The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the Constitution, by which 'no person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President'; and 'the Congress shall have power to establish an uniform rule of naturalization.' Constitution, art. 2, sect. 1; art. 1, sect. 8.

"By the Thirteenth Amendment of the Constitution slavery was prohibited. The main object of the opening sentence of the Fourteenth Amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes (*Scott v. Sandford*, 19 How. 393); and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the State in which they reside. *Slaughter-House Cases*, 16 Wall. 37, 73; *Strauder v. West Virginia*, 102 U. S. 303, 306.

"This section contemplated two sources of citizenship, and two sources only; birth and naturalization. The persons declared to be citizens are 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization act, or collectively, as by the force of a treaty by which foreign territory is acquired."

Citizenship by birth and by naturalization being thus, for all practical purposes, absolute equivalents, it would seem as though it were as much beyond the power of Congress to deprive one who has become a naturalized citizen, of his citizenship, as it would be to deprive a natural born citi-

zen of that right. It has never even been suggested that it is within the power of Congress to deprive a natural born citizen of his citizenship, for any reason other than for a conviction of crime. This follows the common law rule which existed at the time of the adoption of the Constitution, and which must, therefore, be deemed to be read into the Constitution.

That Congress has the power to deprive a natural born citizen of his citizenship, because of his absence from the country, whether it be for a short or for a long period, or because he has taken up either a temporary or a permanent residence abroad, or for any other reason, has never been asserted.

It is true that a natural born citizen, as well as a naturalized citizen, may under our theory of citizenship expatriate himself; but such expatriation is the result of his own voluntary act, and not of compulsory process instituted by the Government. It is likewise true that the Government may decline to extend its protection to its citizens, whether natural born or naturalized, who choose to dwell abroad. That, however, is an entirely different proposition from that here involved, which relates to the involuntary deprivation of a citizen, of his citizenship rights.

The limitation on the power of Congress to deal with the subject of naturalization, has never been stated with greater clearness than it was by Chief Justice Marshall in *Osborn v. United States Bank*, 9 Wheat. 825, when he says:

“It is said, that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety, give a natural-

ized citizen, who is the mere creature of the law, a right to sue in the courts of the United States, as give that right to the bank. This distinction is not denied; and if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which that being possesses. Every act of the bank grows out of this law, and is tested by it. To use the language of the Constitution, every act of the bank arises out of this law. *A naturalized citizen is, indeed, made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.* The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue. *He is distinguishable in nothing from a native citizen, except so far as the Constitution makes the distinction; the law makes none.* There is, then, no resemblance between the act incorporating the bank, and the general naturalization law."

This language was cited with approval by Mr. Justice Gray in *United States v. Wong Kim Ark*, 169 U. S. 702, 703. The question there involved related to the citizenship of a person of Chinese parentage born in the United States. It was held, in an elaborate opinion, that the fact of birth in the United States made such person a citizen of the United States, notwithstanding the clause in the treaty between the United States and China, and the acts of Congress which prohibited Chinese persons from becoming naturalized citizens. The opinion, so far as here material, is as follows:

"The Fourteenth Amendment of the Constitution, in the declaration that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside,' contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens, by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.

"The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. 'A naturalized citizen,' said Chief Justice Marshall, 'becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the National Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue.' *Osborn v. United States Bank*, 9 Wheat. 738, 827. Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power, where it was before, in Con-

gress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.

"No one doubts that the Amendment, as soon as it was promulgated, applied to persons of African descent born in the United States, wherever the birthplace of their parents might have been; and yet, for two years afterwards, there was no statute authorizing persons of that race to be naturalized. If the omission or the refusal of Congress to permit certain classes of persons to be made citizens by naturalization could be allowed the effect of correspondingly restricting the classes of persons who should become citizens by birth, it would be in the power of Congress, at any time, by striking negroes out of the naturalization laws, and limiting those laws, as they were formerly limited, to white persons only, to defeat the main purpose of the constitutional amendment.

"The fact, therefore, that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, 'All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States.' "

From these decisions, the first rendered in 1824 and the second in 1897, it is apparent that until the Act of 1906 was enacted, it was recognized as the proper interpretation of the Constitution, that the power of naturalization vested in Congress is a power to confer citizenship and not a power to take it away, and that when the power to naturalize is lawfully, and without fraudulent inducement, exercised, Congress has exhausted its constitutional rights in that regard, and must, for all purposes, treat a naturalized citizen and a natural born citizen alike. A naturalized citizen is, with the exception already referred to, exactly as though he were a citizen by birth.

When therefore, Congress undertook to lay down a rule with regard to citizens who had become naturalized prior to June 29, 1906, by which such citizenship might be annulled not because of fraud or irregularity in procuring it, but because of a change of his abode by the naturalized citizen within five years after his naturalization, that rule as applied to citizens previously naturalized, is within the inhibition of the Constitution, as interpreted in these decisions.

(2) *The Johannessen Case, and its Dissimilarity With This Case.*

The decision in *Johannessen v. United States*, 225 U. S. 227, does not depart from the decisions just considered, or determine any of the questions which are now presented for consideration. Although that was a proceeding under Section 15 of the Act of June 9, 1906, to cancel a certificate of citizenship, it was based entirely on allegations that the certificate had been fraudulently and illegally procured. The case arose on a demurrer, which conceded all of the allegations of the petition. They were to the effect that Johannessen, a native of Norway, applied for admission to citizenship less than four years after his arrival in this country, and procured a certificate admitting him to citizenship based on the perjured testimony of two witnesses, to the effect that he had resided within the limits and under the jurisdiction of the United States for five years at least, then last past. The facts were not discovered by the Government until June 29, 1908, when Johannessen made a voluntary statement, in the form of an affidavit, which constituted a part of the amended petition, in

which he admitted that the certificate of citizenship had been illegally procured, in that he had not been a resident of the United States for five years, at the time when it was issued.

The contentions of the appellant in that case were, that a decree of naturalization is a judgment of a competent court, subject to all of the rules of law regarding judgments as such, that prior to June 29, 1906, a court of equity could not set aside or annul such a judgment for fraud intrinsic to the record, or for fraud founded upon perjured testimony, or for any matter which was actually presented or considered in rendering the judgment, and that therefore the act of June 29, 1906, which authorized the impeachment of the pre-existing judgment of a coordinate court for fraud, effected by means of the introduction of relevant perjured testimony, was unconstitutional as an exercise of judicial power by the legislature. It was likewise claimed, that the provisions of Section 15 of the Act of 1906, were not retrospective, and that if retrospective the act is void as an *ex post facto* law.

All of these propositions were decided against the appellant, on the theory that Congress had the right to enact a statute which would permit an attack on certificates of citizenship on the ground of inherent fraud and illegality, by means of direct proceedings, and that where actual fraud in the procurement of the certificate was shown, it was within the power of Congress to permit the certificate of naturalization to be reviewed judicially.

The case then under consideration arose under those provisions of the act which in substance provided, that on good cause shown, the question

whether one who claims the privileges of citizenship under the certificate of a court, has procured that certificate through fraud or other illegal contrivance, shall be examined and determined in orderly judicial proceedings. As was said by Mr. Justice Pitney:

"The act makes nothing fraudulent or unlawful that was honest and lawful when it was done. It imposes no new penalty upon the wrongdoer. But if, after fair hearing, it is judicially determined that by wrongful conduct he has obtained a title to citizenship, the act provides that he shall be deprived of a privilege that was never rightfully his."

In other words, what the Court was called upon to decide was, the constitutionality of a remedial act which permitted the review of an *ex parte* judgment of naturalization on the ground of actual fraud inherent in the judgment, the fraud being admitted.

The present case involves none of the elements which led to the decision in the Johannessen case. There is absolutely no allegation of fraud in the complaint. The prayer for cancellation of the appellant's certificate of naturalization is based solely upon the allegation, that he departed from the United States within a period of five years after he was admitted to citizenship, and had at the time of the filing of the complaint established a permanent residence in the City of Johannesburg, South Africa.

The appellant's certificate of citizenship is therefore not attacked, on the theory that he had been unlawfully naturalized. It is not pretended that the provisions of the Naturalization Act in force at the time of his being admitted to citizenship had not been strictly complied with. It is

not intimated that his admission to citizenship was based on insufficient or perjured testimony, or that it was the result of fraud of any kind, or that any of the statutory requirements had not been observed. His rights of citizenship are sought to be divested owing to an occurrence which took place after he had in fact become a citizen, namely, because within five years after his naturalization he had departed from the United States. If he had remained here five years and had thereafter departed, it is not claimed that the validity of his citizenship could be attacked. At the time when he departed from the United States there was no law by which the validity of his naturalization could have been affected by reason of such departure. By a law enacted twelve years after he had become a naturalized citizen, he is sought to be deprived of his citizenship, because prior to such enactment he had lawfully departed from the United States.

On the other hand, the Johannessen case dealt with actual fraud, which tainted the proceedings which culminated in his admission to citizenship. The Act of Congress, so far as that case was concerned, provided a remedy whereby such fraud could be punished, or at least rendered nugatory, so that the privilege of citizenship which had been obtained by means of such fraud could be withheld. Legislation which accomplished such a result, based as it was on the fundamental principle that fraud vitiates all things, was purely remedial.

That portion of the act of 1906 with which we are now concerned, proceeds on an entirely different basis. If it is to be applied to cases of naturalization consummated prior to the passage

of the act, then it undertakes to deprive the naturalized citizen of a vested right of citizenship by a new and arbitrary test, unknown at the time of the granting of the decree of naturalization, and equally unknown at the time when it is claimed that this new and arbitrary test was violated. If the rights of a naturalized citizen, which are, under the Constitution, the equivalent of the rights of a native born citizen, can be thus forfeited, because of the doing of an innocent act, as to which there was at the time no prohibition, and which in no manner offended either the moral law, or the existing public policy, then it would become easy to deprive a large proportion of our naturalized citizens of their constitutional rights, on similar grounds. Congress might then enact a retroactive law to the effect, that failure on the part of a naturalized citizen to vote at any election held within five years after his becoming a citizen would authorize a cancellation of his citizenship; or a similar penalty could be visited upon him if he absented himself from the United States or from the State of his residence for a period of thirty days within ten years after his naturalization, or if he, during that time, subscribed to any newspaper published in a foreign language, or if, during that period, he became or did not become a member of a trade union, political club, or voters' league.

That portion of the act of 1906 now under review, subjects a naturalized citizen to the cancellation of his certificate if, within five years after he became a citizen, he takes permanent residence in a foreign country, although there was no provision against his doing so, at the time when he took up such residence. If the act is valid when

applied to a five year period, it would be equally valid if it had specified ten, twenty or thirty years; and in consequence hundreds of naturalized citizens who have contributed greatly to the development of our country, men prominent in its civic, commercial, political and military life, might have lost their citizenship by the passage of such an act, merely because, for reasons which would be sufficient in the case of a native-born citizen, they may have found it necessary or desirable to take up a residence abroad.

It is to be borne in mind, that we are not now considering the question which might arise in the case of one who had become naturalized under a statute dealing with the subject of naturalization, which imposed as a condition subsequent, a provision like that now under consideration. Assuming it to be within the power of Congress to impose such a condition, the question which is now presented is of a totally different character. By an act passed in 1906, a citizen duly naturalized in 1894 is sought to be deprived of his right of citizenship, because at some time between the date of his naturalization in 1894 and a day in 1899, five years thereafter, he had done what any native-born citizen might at any time do, without the loss of his citizenship. A child born in the United States of Chinese parents, who could not be naturalized, might return with them to China without the loss of his citizenship; and yet duly naturalized citizens of the United States could be made to lose their rights, because not endowed with that prescience which would enable them to foretell what, in the course of time, might be the trend of future legislation.

It would rather seem as though there might be here applied the maxim laid down by Judge Por-

ter in *People v. Medical Society*, 32 N. Y., 194: "Where there is no law, there is no transgression."

(3) *The Contention That the Act Merely Enacts a Rule of Evidence.*

But it was argued below, that this act merely lays down a rule of evidence to the effect, that the acquisition of a permanent residence in a foreign country within five years after the issuance of a certificate of citizenship, shall give rise to a presumption of fraud, that this presumption is only a rule of procedure, and being such, it is within the power of a legislature to create it.

(a.) This statement does not accurately quote the statute. The act does not provide that the taking up of a permanent residence in a foreign country, shall be considered *prima facie* evidence of *fraud*, but merely "of a lack of intention on the part of the person naturalized to become a permanent citizen of the United States at the time of filing his application for citizenship."

(b.) Under the Naturalization Law as it existed in 1894 (*U. S. R. S.* § 2165), there was no obligation on the part of the alien who applied for citizenship, to declare his intention to become "a permanent citizen of the United States." To have imposed such an obligation would have been inconsistent with the right of expatriation, which has long been one of our fundamental doctrines. (*U. S. R. S.* §§ 1999, 2000.) All that the act then required of the alien was, 1, that at least two years prior to his admission "he shall declare on oath * * * that it is *bona fide* his intention to

become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly by name to the prince, potentate, state or sovereignty of which the alien may be at the time a citizen or subject," and 2, "that he shall at the time of his application to be admitted, declare on oath * * * that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state or sovereignty," etc.

(c.) There was, therefore, nothing in the Naturalization Law in force at the time when the appellant became a citizen, which imposed upon him, any more than it did upon a native-born citizen, a prohibition against taking a permanent residence in a foreign country after becoming a citizen, if he desired to do so.

(d.) The Naturalization Act of 1906, however, of which Section 15 which is involved in this action constitutes a part, expressly required, by the second subdivision of Section 4, that the applicant, in the petition filed by him in the proceedings looking to his naturalization, should, among other things, state under oath, not only that it is his intention to become a citizen of the United States, but also "*that it is his intention to reside permanently within the United States.*"

The clause just italicized is absent from the previous Naturalization Law. It is thus clear, that the act of 1906 imposed upon the applicant for naturalization, an obligation which did not exist under the former law; just as the later act imposed other conditions as to which the earlier act was silent.

Hence, the taking up of a residence in a foreign country by one naturalized in 1894, at any time prior to 1899, would not have been a violation of the declaration of intention or of the oath taken by the applicant for admission to citizenship in the proceedings resulting in his naturalization.

(e.) Moreover, while it is true that it is within the province of a legislature to enact, that proof of one fact shall be *prima facie* evidence of another which is the main fact in issue, the inference must not be arbitrary, but there must be a rational relation between the two facts.

Thus in *Bailey v. Alabama*, 219 U. S. 219, it was held that a constitutional prohibition cannot be transgressed indirectly by creating a statutory presumption any more than by direct enactment; so that involuntary servitude cannot be compelled by carrying out contracts of personal service by the creation of a presumption that the person committing a breach of contract is guilty of an intent to defraud, merely because he fails to perform the contract. In the course of the discussion of this proposition, MR. JUSTICE HUGHES said :

"This court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government. *Fong Yue Ting v. United States*, 149 U. S. 698, 749. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue; and where the inference is not purely arbitrary and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law. *Adams v. New York*, 192 U. S. 585; *Mobile, Jackson & Kansas R. R. Co. v. Turnipseed*, 219 U. S. 35.

"The latest expression upon this point is found in the case last cited, where the court by Mr. Justice Lurton said: 'That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.'

"In this class of cases where the entire subject-matter of the legislation is otherwise within State control, the question has been whether the prescribed rule of evidence interferes with the guaranteed equality before the law or violates those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law. But where the conduct or fact, the existence of which is made the basis of the statutory presumption, itself falls within the scope of a provision of the Federal Constitution, a further question arises. It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the State may not in this way interfere with matters withdrawn from its authority by the Federal Constitution or subject an accused to conviction for conduct which it is powerless to prescribe.

"In the present case it is urged that the statute as amended, through the operation of the presumption for which it provides, violates the Thirteenth Amendment of the Constitution of the United States and the act of Congress passed for its enforcement.

That there must a fair relation to and natural connection with the main fact, and the fact upon

which the presumption is to rest, and that the inference of the existence of the main fact because of the existence of the fact actually proved, must not be purely arbitrary or wholly unreasonable, unnatural or extraordinary, was strongly laid down by the late MR. JUSTICE PECKHAM, then a member of the Court of Appeals of New York, in *People v. Cannon*, 139 N. Y. 43.

We submit, that the fact that a naturalized citizen, within five years after his becoming a citizen, proceeds to a foreign country and takes a permanent residence there, at a time when there was no prohibition against his doing so, does not legitimately support the proposition, that there was a lack of intention on the part of the person so naturalized to become a permanent citizen of the United States, at the time of filing his application for citizenship. The statutory declaration of an intention to become a citizen, as provided under the former Naturalization Act (*U. S. R. S.* §2165), was to be made at least two years prior to the applicant's admission. Can it be legitimately contended, from the fact that, nearly seven years thereafter, the person naturalized under the former act went abroad to reside, he can be said to have been lacking in the *bona fide* intention to become a citizen of the United States at the time when he took his oath, or at the time when he actually became a citizen?

The inference of lack of *bona fide* intention to become a citizen from such subsequent action, is purely arbitrary, and is unreasonable, unnatural and extraordinary; especially when one considers that, under the Constitution, by the fact of naturalization in compliance with the terms of the statute then existing, the naturalized citizen and

the native-born citizen were placed on a basis of absolute equality, with the single exception heretofore adverted to.

(f.) Besides, it is to be observed that, in this act, not only is the taking of a permanent residence within five years after the issuance of the certificate of citizenship considered *prima facie* evidence of a lack of intention to become "a permanent citizen of the United States" at the time of the filing of the application therefor, but it is also provided that, in the absence of countervailing evidence, it shall be sufficient in a proper proceeding to authorize the cancellation of the certificate of citizenship, as fraudulent. In other words, an act of which fraud could not be predicated under the former Naturalization Law, is made sufficient for an adjudication of fraud under a subsequently enacted statute, when applied to conduct long preceding the passage of the act authorizing such adjudication, and which was at the time devoid of fraudulent implication.

It is also to be noted, that this conclusion of fraud is made inevitable "in the absence of countervailing evidence" against the proof that the naturalized citizen has taken permanent residence in a foreign country.

This certainly contravenes the rule laid down by JUDGE PECKHAM in *People v. Cannon*, 139 N. Y. 43, where he says:

"A provision of this kind does not take away or impair the right of trial by jury. It does not in reality and finally change the burden of proof. The people must at all times sustain the burden of proving the guilt of the accused beyond a reasonable doubt. It, in substance, enacts that, certain facts being proved, the jury may regard them, if believed, as sufficient to convict,

in the absence of explanation or contradiction. Even in that case, the court could not legally direct a conviction. It cannot do so in any criminal case. That is solely for the jury, and it could have the right, after a survey of the whole case, to refuse to convict unless satisfied beyond a reasonable doubt of the guilt of the accused, even though the statutory *prima facie* evidence were uncontradicted. The case of *Commonwealth v. Williams* (6 *Gray*, 1) supports this view.

Without the aid of the statute, the presumption provided for therein might not arise from the facts proved, although the statute says they shall be sufficient to authorize such presumption. The legislature has the power to make these facts sufficient to authorize the presumption (*State v. Mellor*, 13 *R. I.* 669), and the jury has the power, in the absence of all other evidence, to base its verdict thereon, if satisfied that the defendant is guilty. But the jury must in all cases be satisfied of guilt beyond a reasonable doubt, and the enactment in regard to the presumption merely permits, but cannot in effect direct the jury to convict under any circumstances. The dissenting opinion of Mr. Justice Thomas, delivered in *Commonwealth v. Williams* (6 *Gray*, *supra*), contains all that can be said against the validity of this kind of legislation."

(4) *The Decisions Relied on by the Court Below.*

The cases cited in the opinion of JUDGE HAND, below, do not sustain this legislation.

In *People v. Cannon*, just considered, the act which was sustained declared, that the possession by a junk dealer or dealer in second-hand articles of bottles or kegs marked as prescribed by the act, was presumptive evidence of the unlawful use, purchase and traffic therein, due notice having been given of the ownership of the bottles and kegs so marked.

In *Board of Commissioners of Excise v. Merchant*, 103 *N. Y.* 143, the act provided that whenever any person is seen to drink in a shop or saloon, spirituous liquors which were forbidden to be

drank therein, it should be *prima facie* evidence that such liquors were sold by the occupant of the premises or his agent with the intent that they should be drank therein.

In *Commonwealth v. Williams*, 6 *Gray*, 1, the act provided that, in prosecutions for common selling of spirituous and intoxicating liquors, delivery in or from any building or place, other than a dwelling house, "shall be deemed *prima facie* evidence of a sale."

Commonwealth v. Rowe, 14 *Gray*, 117, arose under a later statute with practically the same phraseology.

State v. Day, 37 *Me.* 244 and *State v. Sheppard*, 64 *Kan.* 451, arose under laws regulating the sale of liquors, which were in all respects equivalent to those just considered.

In *Commonwealth v. Miner*, 88 *Ky.* 422, an act made it unlawful for a physician to prescribe whiskey unless the person for whom it was prescribed was actually sick and it was "absolutely required as a medicine," and provided that if it is proven on the trial that a physician gave the prescription "such proof casts the burden upon him to show that the whiskey was needed as a medicine by the person for whom it was prescribed."

In the *Turnipseed Case (supra)*, which might have been, but was not cited by the Court below, a statute of Mississippi made proof of injury inflicted by the running of the locomotives or cars of a railroad company, *prima facie* evidence of the want of reasonable skill and care on the part of its servants in reference to such injury.

In *Fong Yue Ting v. United States*, 149 *U. S.*,

698, 729, the act which required Chinese laborers who were entitled to remain in the United States, to apply within a year to the Collector of Internal Revenue for a certificate of residence, as a condition to the right of continued residence here, provided, that any one not applying and who was thereafter found in the United States without such certificate, should be deemed and adjudged to be unlawfully in the United States, unless he shall clearly establish to the satisfaction of the judge before whom deportation proceedings are instituted that, by reason of accident, sickness, or other unavoidable cause, he was unable to procure his certificate, and by at least one credible white witness that he was a resident of the United States at the time of the passage of the act.

Inasmuch as the right to exclude or expel all aliens, absolutely or upon condition, was declared to be an inherent and inalienable right of every sovereign, and this legislation related solely to aliens, the rule of evidence declared by this statute was clearly within the congressional power.

Ex parte Fisk, 113 U. S. 713, does not apparently bear on the question here involved.

In all of these cases, the statutes which were challenged were prospective in their operation, in every sense of the word, related to evidence of facts transpiring after their passage, and merely laid down rules of evidence, without in any way undertaking to deal with substantive vested rights; and in every instance the test laid down in *People v. Caanon (supra)*, and *Bailey v. Alabama (supra)*, as to the legitimacy and reasonableness of the statutory presumption was met.

The cases of *Webb v. Den*, 17 How. 576, *Howard v. Moot*, 64 N. Y. 262, and *Rich v. Flanders*, 39

N. H. 304, are also cited by Judge Hand as authority for the proposition, that a statutory presumption may be deduced from facts which occurred before the statute creating the presumption was enacted. It is believed that a careful examination of these authorities will indicate, that they do not justify the rule of presumption which the appellee seeks to enforce in this case.

Webb v. Den (supra), involved an act of the legislature of Tennessee passed in 1839, which provided that whenever a deed has been registered twenty years or more, the same shall be presumed to be upon lawful authority, and the probate shall be good and effectual, though the certificate on which the same has been registered has not been transferred to the register's books, no matter what has been the form of the certificate of probate or acknowledgment.

It is evident that this statute was passed for the purpose of quieting and confirming titles, in order to prevent gross injustice resulting from the blunders of unskilled conveyancers. It was not only a remedial act, declaratory of what should, after its passage, be received in courts as legal evidence of the authenticity of ancient deeds, but it was also a statute of repose. It related to deeds actually made and executed, and did not undertake to change the contract of the parties or to interfere with any substantive or vested rights.

Howard v. Moot (supra), involved the validity of an act which authorized the perpetuation of testimony under the direction of the Court of Chancery, with respect to the title to the Pulteney estate. The act was passed in 1821. The testimony sought to be introduced by virtue of it, was offered in a litigation which arose fifty years later. It was deemed purely remedial and as declaratory

of a rule of evidence, and consequently within the legislative control. It was conceded that the legislature could not take from parties vested rights, and that even an act of this remedial character, which would make evidence conclusive which was not so necessarily in and of itself and which precluded the adverse party from showing the truth, would be void as indirectly working a confiscation of property or a destruction of vested rights.

Rich v. Flanders (supra), likewise related to a statute which changed the rules of evidence and of practice, by removing the disqualification of interest in witnesses, thereby enabling parties to actions to testify, and making it applicable to cases in which the cause of action had accrued prior to its passage. In the opinion rendered in that case by Judge Fowler, the distinction was drawn between legislation remedial or procedural in its character and that relating to substantive rights. The following excerpts are taken therefrom: (p. 357)

“It was a principle of the English common law—the body of which was in force here at the period of the Revolution, and is expressly recognized in our Constitution—as ancient as the common law itself, and resting on the recognized doctrines of the civil code, that a statute, even of the omnipotent parliament of England, was not to have retrospective effect, so as to take away or impair vested rights, or rights complete in themselves and clearly entitled by existing laws to be enforced. *Nova constitutio futuris forman debet imponere, non praeteritis.* This was the doctrine laid down by Braeton and Coke, and in *Gilmore v. Shuter*, 2 *Shower* 17, 2 *Mod.* 310, 2 *Lev.* 227, 2 *Jones* 108, 1 *Freeman* 466. 1 *Ventris*, 330, decided in the 29th year of the reign of Charles II., it received a solemn recognition in the court of King’s Bench. In that case a suit was brought after the 24th of June, 1677, upon a parol promise made before that date, but to be performed afterwards; and the

question was whether it was void, or the action founded upon it could be defeated by the statute of frauds and perjuries, which enacted that 'from and after the 24th of June, 1677, no action should be brought to charge any person upon any agreement made in consideration of marriage, &c., unless such agreement were in writing,' &c. It was admitted that the promise declared on was of the same kind with those mentioned in the statute, and the suit had been commenced after the date specified in the statute; but the court agreed unanimously that the statute was to be read by transposition of the words, for that it was not to be presumed that the act had a retrospect to take away an action to which the plaintiff was then entitled, and that the other construction would make the act repugnant to common justice."

Later on, the opinion of CHIEF JUSTICE RICHARDSON in *Woart v. Winnick*, 3 N. H. 473, is quoted as follows:

"A retrospective law for the punishment of an offense, within the meaning of our Bill of Rights, must be a law made to punish an act previously done, or to increase the punishment of such an act, or in some way to change the rules of law in relation to its punishment, to the prejudice of him who committed it. In other words, it must be a law establishing a new rule for the punishment of an act already done. A law for the decision of a cause, is a law prescribing the rules by which it is to be decided; a law enacting the general principles by which the decision is to be governed. And a retrospective law for the decision of civil causes is a law prescribing the rules by which existing causes are to be decided, upon facts existing previous to the making of the law. Indeed, instead of being rules for the decision of future causes, as all laws are in their very essence, retrospective laws for the decision of civil causes are, in their nature, judicial determinations of the rules by which existing causes shall be settled upon existing facts. They may relate to the grounds of the action or the grounds of the defense, both of which seem to be equally protected by the Constitution. And as, on the one hand, it is not within the constitutional competency of the legislature to amend by statute any legal ground on which a pending action is founded, or to create any new bar by which such action may be defeated; so, on

the other hand, it is believed that no new ground for the support of an existing action can be created by statute, nor any legal bar to such an action be thus taken away. A statute attempting any of these things seems to us to be a retrospective law for the decision of civil causes, within the prohibition of this article of the Bill of Rights. It is the province of the legislature to provide rules for the decision of future causes; of the courts to determine by what rules existing causes are to be decided."

To substantially the same effect is *The Society for the Propagation of the Gospel v. Wheeler*, 2 *Gallison* 139, where Mr. JUSTICE STORY said:

"Every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already past, must be deemed a retrospective law, within the intent and meaning of this article of the Bill of Rights of the Constitution of New Hampshire."

In this connection the case of *Conrad v. Smith*, 6 *N. D.* 337, s. c. 70 *N. W. Rep.* 816, is quite pertinent. There, at the time of the sale of personal property and of the attachment thereof as the property of the vendor, the statute declared that the fact that a sale was not accompanied by an immediate delivery, and followed by an actual and continued change of possession, should create a conclusive presumption of fraud, and that the sale should for that reason be void. Subsequently the statute was amended by converting the conclusive presumption of fraud into a rebuttable presumption. It was decided that the amendatory act was not a mere regulation of the law of evidence, but formed a part of the substantive law, and therefore interfered with a vested right which had been secured by the attaching creditor, and

consequently, if retrospectively interpreted, was unconstitutional.

(5) *The Act of 1907.*

The act of 1907, which was also relied upon by the appellee in the Court below, has no application here. This suit does not purport to be brought under its provisions. In fact that act does not contemplate the institution of any legal proceedings. The first section merely relates to the issuance of passports to persons who are not citizens of the United States, but who have made a declaration of intention to become citizens, and limits the extent of protection which our Government is to give to them during the period prescribed in that section.

The second section relates to the subject of expatriation, its general provisions being applicable to native-born as well as to naturalized citizens. It also contains a provision relating to a naturalized citizen who shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state. As to such person it is provided, that it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during such years. It is evident that this provision is not intended to actually deprive such person of his rights as a citizen, or to actually expatriate him. It is merely intended that, for purposes of governmental protection, he is presumed to have placed himself beyond the right of claiming governmental intervention in his behalf.

This act is not intended to cover a case such as that which is included in Section 15 of the Act of 1906. That depends upon the theory that the person proceeded against has never been really naturalized; while the act of 1907 proceeds on the assumption, that the person to whom it relates has been in fact naturalized, but, by reason of his non-residence, has deprived himself of the right of protection as an American citizen while abroad. The language of this act is clearly prospective, and cannot therefore have any bearing upon the appellant, because both the time of the commencement of this action and of its trial was within five years of the date when the act went into effect.

The debate in the House of Representatives upon this statute, which is to be found in *41 Congressional Record, Part 2, pp. 1463-1467*, affords clear evidence of the purpose of the acts of 1906 and 1907 respectively, and indicates the reasons which led to their passage.

II.

That portion of Section 15 of the Act of 1906 which is involved in this action, is confined in its operation to cases of naturalization under the Act of 1906, and does not include persons naturalized under the prior act.

(1) *The Differences Between the Act of 1906 and the Prior Law.*

It is undoubtedly true, that most of the provisions of Section 15 apply to all cases of naturalization, whether before or after the passage of

the act of 1906. This, as has been pointed out in the *Johannessen Case*, 225 U. S. 227, is indicated by the last sentence of the section, which reads:

"The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws."

Nevertheless it is apparent from the discussion under Point I, that, when Congress provided for the case where an alien shall within five years after the issuance to him of the certificate of citizenship take permanent residence abroad, it can only have had reference to one naturalized under the act of 1906. Besides that portion of Section 15 which deals with this subject, expressly confines its operation to the case of an alien who has secured a certificate of citizenship under the provisions of the act of 1906; for the second paragraph of the section begins with the following explicit declaration: "If any alien who shall have secured a certificate of citizenship under the provisions of *this* act shall, * * * it shall be considered *prima facie* evidence * * * and in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent," etc.

The *Johannessen Case* did not arise under this clause; nor did *United States v. Mansour*, 170 Fed. Rep. 671, recently affirmed in this Court, arise thereunder. Both of these cases were based on the charge of actual fraud—in the one case, that the applicant had not been a resident of the United States for five years at the time of his naturalization, and that he had procured perjured testimony whereby the Court was deceived;

and in the other case, that the applicant himself never took or subscribed the oath of renunciation or allegiance, but procured another to personate him throughout the proceedings, and that he had not resided within the United States for the continuous period of five years.

It has already been shown that, under the Naturalization Act as it existed at the time of the issuance to the appellant of his certificate of citizenship, there was no requirement that the applicant should intend to reside permanently within the United States. No oath to that effect was called for. On the other hand, the act of 1906 requires an oath from the applicant, that it is his intention to reside permanently within the United States. Consequently, the reference in Section 15 to "a lack of intention on the part of the alien to become a permanent citizen of the United States at the time of filing his application for citizenship," while in full harmony with the other new provisions inserted in the act of 1906, is inapplicable to naturalization under the prior act, because that act did not require one who applied for naturalization to harbor the intention of residing permanently within the United States. Nor was there anything in any other legislation prior to 1906, which made it necessary for any citizen, native-born or naturalized, to permanently reside within the United States.

The second paragraph of Section 15 of the Act of 1906, as has been shown under Point I, is not a provision relating to evidence or procedure, but is an enactment of substantive law affecting a vested right, and must therefore receive that prospective interpretation which it in so many words gives to itself.

While it is true that most of the provisions of

Section 15, are remedial, and are, therefore, properly applicable to any case relating to naturalization which comes within their terms, irrespective of the time when the naturalization takes place, that paragraph constitutes an exception, not only by necessary implication, but by its express terms, to the general and remedial provisions contained in the section.

(2) *The Right to Refer to Legislative Documents, Reports and Debates.*

Conclusive evidence of this statutory purpose is afforded by the history of the second paragraph of Section 15, now under consideration.

It is well settled, that a court may refer to the public history of the times, and to legislative documents, to ascertain the reason of an enactment as well as the meaning of particular provisions therein, and to that end may consider the evil which it is designed to remedy, contemporaneous events, and the existing situation with regard to the subject-matter of the legislation as it was pressed upon the attention of the legislative body.

United States v. Union Pacific R. R. Co., 91 U. S. 72, 79.

Platt v. Union Pacific R. R. Co., 99 U. S. 60.
Holy Trinity Church v. United States, 143 U. S. 463.

The Delaware, 161 U. S. 472.

Shaw v. Kellogg, 170 U. S. 331.

Binns v. United States, 194 U. S. 495.

Johnson v. Southern Pacific Co., 196 U. S. 19.

McLean v. Arkansas, 211 U. S. 339.

Wadsworth v. Boysen, 148 Fed. Rep. 775.

Tenement House Department v. Moeschen,
179 N. Y. 325.
Musco v. United Surety Co., 196 N. Y. 465.

In *Pinns v. United States* (*supra*), Mr. Justice Brewer said:

"While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, *United States v. Freight Association*, 166 U. S. 290, 318, yet it is also true that we have examined the reports of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports. *Holy Trinity Church v. United States*, 143 U. S. 457, 464. When sections 461 and 462 were under consideration in the Senate the Chairman of the Committee on Territories, in response to inquiries from Senators, made these replies: * * *"
 (Then follows a quotation from the debate as reported in *Vol. 32, Congressional Record, Part III*, page 2235.)

In *Johnson v. Southern Pacific Co.* (*supra*), Chief Justice Fuller, after quoting from the annual messages of President Harrison and the Senate and House report relative to proposed legislation requiring railroads to adopt safety appliances, added (p. 20):

"The diligence of counsel has called our attention to changes made in the bill in the course of its passage, and to the debates in the Senate on the report of its committee. 24 Cong. Rec., pt. 2, pp. 1246, 1273, *et seq.* These demonstrate that the difficulty as to interchangeability was fully in the mind of Congress and was assumed to be met by the language which was used."

(3) *The Genesis of the Act of 1906.*

By Executive order of March 1, 1905, President Roosevelt appointed Messrs. Milton D. Purdy, of the Department of Justice, Gaillard Hunt, of the Department of State and Richard K. Camp-

bell, of the Department of Commerce and Labor, commissioners to investigate and report upon the subject of naturalization in the United States. The Commission reported on November 8, 1905, and on December 5, 1905, the President transmitted for the consideration of the Congress the report of the Commission. This report was ordered printed and referred to the House Committee on Immigration and Naturalization on December 7, 1905, and is *House Document No. 46 of the Fifty-ninth Congress, 1st Session.*

(4) *House Document No. 46.*

In this report, which is historically interesting, among other subjects discussed was that of fraudulent naturalization. After discussing the various incentives for fraud which had led to such naturalizations, the commissioners state (p. 14), referring to various citizens who travel abroad with the United States passport:

“Many remain abroad permanently and permanently receive recognition as American citizens. *When they apply for naturalization the inquiry made concerns their past and not their future. It is, in fact, not unlawful for them to apply for naturalization when they actually intend to leave the United States as soon as they are naturalized. Even the declaration of intention required by law merely contemplates a statement of intention to become a citizen of the United States; it does not require a declaration of an intention of making a domicile in the United States.* By the laws of other countries naturalization depends primarily upon manifest domicile in the country which confers naturalization. * * *

“The Commission earnestly urges that this omission be rectified and that every alien be required to solemnly swear, when he makes his application for naturalization, that he intends to make his permanent residence in the United States, and that this intention be set forth in the certificate of his naturalization which is given him. Holding this paper as the basis of his protection and his rights while in a foreign country, his status will depend upon his having observed the compact it implies.”

The Commission submitted two drafts of a bill, each of which embodied substantially all of the recommendations contained in the report as to which the commissioners were all agreed. The first of these bills, which appear at pp. 92 to 106 of the document, embodies practically all of the provisions which are contained in the Naturalization Act of 1906, including the requirement that the petition of the applicant for citizenship should state that it is his intention to reside permanently within the United States. Section 34 (*p. 106*) relates to procedure for the cancellation of void or voidable certificates. It is practically identical in phraseology with Section 15 of the Naturalization Act as adopted, with the exception of the second paragraph of Section 15, which, as will be presently seen, was added to the bill during the consideration by the House of Representatives and was not contained in the original draft. The only difference between Section 34 of the draft and Section 15 of the bill as enacted, other than the addition to it, of the second paragraph, consists merely of a few verbal changes, which are in no wise material, in the introductory clause of the section.

(5) *The Introduction of the Second Paragraph Into Section 15.*

While the Naturalization Act of 1906 thus originating, was under discussion in the House of Representatives, Mr. Crumpacker of Indiana, referring to the proposed provision of the pending bill which related to the cancellation of certificates of citizenship, and which was erroneously referred to as Section 17, instead of as Section 15 (See *Cong. Rec.*, vol. 40, part 8, pp. 7869-7871), said:

"Under the law as it exists at this time an applicant for citizenship is not required to state or prove that it is his intention to become a permanent resident of the United States if he shall become a citizen. The court granting citizenship may be apprised of the fact that it is his intention to permanently absent himself from the country, and yet the right must be granted. One of the most salutary features of the bill under consideration is, that it requires an applicant for naturalization to solemnly swear that it is his intention to become a permanent resident of the United States if citizenship shall be granted to him. Section 17 [15] of the pending bill contains provisions for the cancellation of fraudulent certificates of citizenship. If any alien shall impose upon the court by perjured testimony, or if a certificate has been issued in violation of law, the bill makes the certificate invalid and authorizes proceedings in any court of competent jurisdiction to cancel the certificate of citizenship, and notice of cancellation shall be sent to the Department of Commerce and Labor and duly recorded. Naturalization is a privilege of great value, but proceedings to establish it ought to be solemnly and rigidly observed. The boon of American citizenship must not be cheapened by lax and unconventional methods of courts and public officers who administer the law, but once granted it should endure for all time. It is conferred by the Federal Constitution and by laws authorized by the Constitution. When citizenship is once legally granted, of course it cannot be invalidated, and it ought not to be, but no one questions that it is within the power of the Government to provide for the cancellation of certificates of citizens that have been fraudulently obtained. A certificate tainted with fraud is in the sense of the law no certificate at all. When the time comes for proposing amendments to the bill, I intend to offer an amendment providing in effect that where an applicant secures a certificate of citizenship *under the present bill*, if it should become a law, and within five years after securing his certificate returns to the country of his nativity or goes to any other foreign country and takes up a permanent domicile therein, it shall be regarded as *prima facie* evidence of a lack of intention on his part to become a permanent resident of the United States at the time he applied for and obtained his certificate of citizenship, and in the absence of other evidence it will be sufficient to justify the court in a proper proceeding to cancel his certificate as fraudulent." (*Cong. Rec.*, vol. 40, part 7, p. 7040.)

Thereupon Mr. Crumpacker's amendment was introduced and was twice read (*p. 7041*). It is important to observe that it is in the identical language of what is now the second paragraph of Section 15 of the Naturalization Act of 1906, which, on *p. 7, supra*, is printed in italics, beginning with the words, "If any alien who shall have secured a certificate of citizenship under the provisions of *this act* shall," etc.

The genesis and purpose of the provision, under which this action has arisen, is thus clearly indicated. The language of its author, just quoted, is significant, since it indicates beyond peradventure of a doubt, that it was his intention that the terms of his amendment, interpolated into Section 15 of the Naturalization Act of 1906, as originally introduced, should relate only to such certificates of citizenship as might be procured *under the bill then pending*, and hence was to have no retroactive effect upon certificates secured under the previous law, which, as he forcibly pointed out, did not require an applicant for citizenship to make any statement as to his intention to become a permanent resident of the United States, as is required under the act of 1906.

When the bill came up for subsequent discussion in the House of Representatives, Mr. Bonynge of Colorado, who had charge of it, reported as the action taken in the Committee of the Whole (*Cong. Rec., vol. 40, part 8, p. 7874*) as follows:

"In the amendments that we have sent to the Clerk's desk was also included an amendment proposed by the gentleman from Indiana [Mr. Crumpacker], which provides that if an alien after receiving a certificate of nat-

uralization goes to his former country within five years and remains there permanently, taking up a permanent residence, it shall be construed as *prima facie* evidence that he did not intend to reside permanently in the United States at the time when he made his application, and then it provides for proceedings for the cancellation of the certificate obtained under such circumstances."

After some discussion, the following colloquy took place:

"**MR. LOUDENSLAGER.**—After the naturalization has been perfected in this country, how long a residence abroad does it require before it is concluded to be indicative that the naturalized person does not longer desire to be a citizen?

MR. BONYNGE.—*I will ask the gentleman from Indiana (Mr. Crumpacker), who prepared that amendment, to answer that question.*

MR. CRUMPACKER.—What is the question?

MR. LOUDENSLAGER.—What residence abroad, after naturalization, is permitted in this bill?

MR. CRUMPACKER.—Whenever an alien secures naturalization *under this law*, and within five years after leaves for a foreign country and becomes a permanent resident there—

MR. LOUDENSLAGER.—What constitutes permanent residence?

MR. LOUDENSLAGER.—Does not the gentleman think it would be better to fix the time that he may be permitted to remain in that country?

MR. CRUMPACKER.—Oh, no; because many people will remain there indefinitely on business or for health, or for one purpose or another, and yet have no intention of giving up their home here; but if an alien comes here and remains only long enough to secure naturalization, and then takes his certificate and secures a passport and returns to the country of his origin or to another foreign country, and takes up a permanent domicile there, with no intention of returning to the United States, practically expatriating himself, that ought to be *prima facie* evidence.

MR. LOUDENSLAGER.—Does not the gentleman consider that those men who go abroad and engage in business and stay there have a permanent residence there?

MR. CRUMPACKER.—Oh, no; not necessarily.

MR. LOUDENSLAGER.—Why not?

MR. CRUMPACKER.—It depends on circumstances. If it is an American, he may be there for the purpose of engaging in business.

MR. BONYNGE.—An American citizen, either naturalized or native.

MR. CRUMPACKER.—Either naturalized or native.

MR. LOUDENSLAGER.—I am speaking of the naturalized ones only.

MR. CRUMPACKER.—Residence is largely a question of intention, and it can not be defined in any bill. It is, as I say, largely a question of intent.

MR. LOUDENSLAGER.—How can a permanent residence ever be determined?

MR. CRUMPACKER.—Take, for instance, our consular or diplomatic representatives in foreign countries. When a native of Turkey stays here long enough to get citizenship and a passport, goes back to Turkey and identifies himself with Turkish civilization, erects a home and goes into business, and leaves nothing here to come back to, that would be good evidence of a permanent citizenship abroad."

The bill (H. R. 15442) was then passed as amended (*p. 7876.*)

Its history in the Senate is to be found in Volume 40 the Congressional Record at the following pages 7913, 9009, 9359-9361, 9407, 9411, 9505, 9620, 9691. It will be observed that no change in Section 15 was proposed by the Senate, and the bill was finally passed by both houses in substantially the form in which it was originally presented to the House, with the addition of the Crum-packer amendment to Section 15.

III.

Even if Section 15 were in terms applicable to the appellant and were as to him constitutional, we nevertheless contend that he did not take up a permanent residence at Johannesburg, but continued to be a legal resident of the United States.

The evidence which has been collated under the Statement of Facts does not justify the conclusion of the Court below. The appellant came to the United States in May, 1888. He lived at New York continuously for more than six years. He was a medical student there for four years, receiving his degree in April, 1893. For a year and a half thereafter he conducted a drug-store. While a student, and in June, 1892, he declared his intention to become a citizen, and two years thereafter was actually admitted as a citizen.

He left this country on account of impaired health. The medical certificates supplied by the appellee confirm that fact. They show that he was under treatment for pulmonary affection, which required him to sojourn in a high altitude and a rarefied atmosphere such as the uplands of the Transvaal afforded.

Although he spent most of his time at Johannesburg, he returned to the United States in June, 1907. It is true that he did not then expect to remain in the United States, but there is nothing to indicate that he had any other idea than that of continuing his residence in America, as is shown by his numerous sworn applications for passports, made in 1894, 1899, 1902, 1905 and 1907. He steadily kept his flag of allegiance flying (*Rec. pp. 23, 24*), indicating it to be his intention to return to

the United States, and declaring his permanent residence to be the City of New York.

While the Consular Agents indicate it to be their opinion, that he is a permanent resident of Johannesburg, they do not state a single fact which justifies that conclusion, but indulge in mere argument to sustain their contention. The fact that he practised his profession at Johannesburg, while there for the purpose of regaining his own health, is entirely consistent with his claim, that he was there merely temporarily and not permanently; and the fact that he served in the Boer War, in no wise indicates that he had renounced his American citizenship. It merely shows that, at a time when the behests of humanity required any physician residing near the scene of war to aid the wounded and afflicted, he had responded to that humanitarian call. There is nothing to indicate whether he served with the Boers or with the British. It is to be presumed that he was prepared to serve all who required assistance. His act was one of common humanity, and does not justify the inference of an intention to surrender his American citizenship or to change his legal domicile.

Residence is always a matter of intention. His intention to remain a resident and citizen of the United States was manifested over and over again.

The decisions in *Dupuy v. Wurtz*, 53 N. Y. 556, *Moorhouse v. Lord*, 10 H. L. C. 272, *Marchioness of Huntly v. Gaskell*, 1906 App. Cas. 56 and *Matter of Newcomb*, 192 N. Y. 238, strongly support our position.

Although *Dupuy v. Wurtz*, (*supra*), related to the subject of succession, what was said on that subject must apply *a fortiori* to the subject of citi-

zenship. Judge RAPALLO, one of New York's greatest jurists, said:

"To effect a change of domicil for the purpose of succession there must be not only a change of residence, but an intention to abandon the former domicil, and acquire another as the sole domicil. There must be both residence in the alleged adopted domicil and intention to adopt such place of residence as the sole domicil. Residence alone has no effect *per se*, though it may be most important, as a ground from which to infer intention. Length of residence will not alone effect the change. Intention alone will not do it, but the two taken together do constitute a change of domicil. (*Hodgson v. De Beauchesne*, 12 *Moore P. C. Cases*, 283, 328; *Munro v. Munro*, 7 *Cl. & F.* 877; *Collier v. Rivaz*, 2 *Curteis*, 857; *Aikman v. Aikman*, 3 *McQueen*, 855, 877.) This rule is laid down with great clearness in the case of *Moorhouse v. Lord* (10 *H. L.*, 283, 292), as follows: Change of residence alone, however long continued, does not effect a change of domicil as regulating the testamentary acts of the individual. It may be, and is, strong evidence of an intention to change the domicil. But unless in addition to residence there is an intention to change the domicil, no change of domicil is made. And in *Whicker v. Hume* (7 *H. L.*, 139), it is said the length of time is an ingredient in domicil. It is of little value if not united to intention, and is nothing if contradicted by intention. And in *Aikman v. Aikman* (3 *McQueen*, 877), Lord Cranworth says, with great conciseness, that the rule of law is perfectly settled that every man's domicil of origin is presumed to continue until he has acquired another sole domicil with the intention of abandoning his domicil of origin; that this change must be *animo et facto*, and the burden of proof unquestionably lies upon the party who asserts the change.

"The question what shall be considered the domicil of a party, is in all cases rather a question of fact than of law. (*Bruce v. Bruce*, 6 *Bro. Par. C.*, 566.) With respect to the evidence necessary to establish the intention, it is impossible to lay down any positive rule. Courts of justice must necessarily draw their conclusions from all the circumstances of each case, and each case must vary in its circumstances; and moreover, in one a fact may be of the greatest importance, but in another the same fact may be so qualified as to be of little weight. (12 *Moore Priv. C. C.*, 330.)

"In passing upon such a question, in view of the im-

portant results following from a change of domicil, the intention to make such a change should be established by very clear proof (*Donaldson v. McClure*, 20 *Scotch Session Cases*, 2d series, 321; *s. c. affd. 3 McQueen*, 852), especially when the change is to a foreign country. (*Moorhouse v. Lord*, 10 *H. L.*, 283.)

"The intention may be gathered both from acts and declarations. Acts are regarded as more important than declarations, and written declarations are usually more reliable than oral ones."

After reviewing the testimony as to the sojourn of the decedent from 1859 to 1868, Judge RAPALLO continues:

"The present is one of the exceptional cases in which the duty devolves upon this court to pass upon the facts as well as the law. And we think that the conclusion of fact, fairly to be drawn from all the evidence, is that the testatrix, after having long and consistently entertained the intention of returning, had finally become satisfied that the state of her health and nerves was such that she would be unable to return to her home, and would, in all probability, die abroad. At the same time it establishes no intention to adopt a foreign domicil, but that she desired and claimed to retain her domicil of origin, and to have her estate administered according to the laws of the State of New York. This, the learned counsel for the contestants contends, the law would not permit her to do. That her long continued stay in Europe, in connection with her final abandonment of the idea of returning to New York; her dwelling, during the winter of each year, at Nice, furnishing, in part, the rooms which she occupied in the hotel; the removal to that place of a portion of her personal effects, her hiring an apartment in the hotel by the year for the storage of such articles as she did not carry with her on her summer travels, and always returning to the same place, afforded such clear evidence of the abandonment of her domicile in New York, and adoption of a new domicile at Nice, that no claim on her part to continue to be considered a citizen and resident of New York could preserve her domicil of origin; and he has cited numerous authorities in support of these positions.

"An examination of these authorities will show that they proceed upon the ground that the person whose domicil was in question had actually settled in a new

residence, with the intention of making it a permanent home; that this intention was manifested by unequivocal acts which outweighed any declarations to the contrary, and the intention was found as matter of fact. * * *

"In all these cases it was upon the ground of a clearly proved voluntary and intentional acquisition of a foreign domicil that the courts held the former domicil abandoned.

"The late cases of *Jopp v. Wood* (1864, 34 J. L. Eq. 212) and *Moorhouse v. Lord* (10 H. L. 284), proceed upon the ground that in order to acquire a new domicil there must be an intention to abandon the existing domicil. All the authorities agree that to effect a change of domicil there must be an intention to do both. Some of them hold that the intention to do one implies an intention to do the other. But in all the cases the question of intention is treated as one of fact, to be determined according to the particular circumstances of each case. * * *

"In the present case we find no sufficient evidence of an intention to adopt Nice or any other place as a permanent home or domicil. The plans of the testatrix after November, 1868, so far as disclosed, had reference to failing health and an apprehension that she might not long survive, rather than to adopting and settling in a new home. If she chose to be a wanderer during the short period of life which she supposed might still remain to her, she would not thereby, as respects her succession, lose her domicil of origin. * * * A mere declaration of intention not to return is not conclusive as to a change of domicil. As well expressed by Lord Kingsdown in *Moorhouse v. Lord* (10 H. L. 293): 'I can well imagine a case in which a man leaves England with no intention whatever of returning, but with a determination and certainty that he will not return.' He then supposes the case of one laboring under a mortal disease, whose physician advises him that his life may be prolonged or his sufferings mitigated by a change to a warmer climate, and says that to hold that he cannot do that without losing his right to the intervention of the English laws as to the transmission of his property after his death, would be revolting in common sense and the common feelings of humanity."

In *Marchioness of Huntly v. Gaskell (supra)*, it was held that a person having a domicile of origin in England does not lose it by making his

home in Scotland for many years, unless in the circumstances, his doing so clearly shows his intention to abandon his original domicile. In the course of his judgment the EARL OF HALSBURY said:

"I myself think in my view of the law that it is expressed very well indeed by Lord Curriehill, approved and quoted by Lord President Inglis in the case of *Steel v. Steel* (1888), 15 R. 896. 'It is, I think,' says the learned judge, 'by no means an easy thing to establish that a man has lost his domicile of origin, for as Lord Cranworth said in the case of *Moorhouse v. Lord* (1863), 10 H. L. C. 272. 'In order to acquire a new domicile, a man must intend *Quatenus in illo exuere patriam*,' and I venture to translate these words into English as meaning that he must have a fixed intention or determination to strip himself of his nationality, or, in other words, to renounce his birthright in the place of his original domicile. The serious character of such a change is very well expounded by Lord Curriehill in the case of *Donaldson v. M'Clure* (1857), 20 D. 307. He says: 'To abandon one domicile for another means something far more than a mere change of residence. It imports an intention not only to relinquish those peculiar rights, privileges and immunities which the law and constitution of the domicile confer on the denizens of the country in their domestic relations, in their business transactions, in their political and municipal status, and in the daily affairs of common life, but also the laws by which the succession to property is regulated after death. The abandonment or change of a domicile is therefore a proceeding of a very serious nature, and an intention to make such an abandonment requires to be proved by satisfactory evidence.' "

In *Matter of Newcomb (supra)*, JUDGE VANN said:

"As domicile and residence are usually in the same place, they are frequently used, even in our statutes, as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Resi-

dence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

"The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals. Less evidence is required to establish a change of domicile from one state to another than from one nation to another. In order to acquire a new domicile there must be a union of residence and intention. Residence without intention or intention without residence is of no avail. Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time with the intention in good faith to change the domicile, has that effect. *Uno solo die constituitur domicilium so de voluntate appareat.* Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention it cannot effect a change of domicile. (*Dupuy v. Wurtz*, 53 N. Y. 556, 561; *The Venus*, 8 *Cranch*, 253; *Carey's Appeal*, 75 *Penn. St.* 201, 205; *Wharton's Conflict of Law*, 2d ed., §§21, 56, 66.) There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration. The subject is under the absolute control of every person of full age and sound mind who is free from restraint, unless it may be that the domicile of a wife is controlled by that of her husband as long as she lives with him. (*Story's Conflict of Law*, 7th ed., §46.) Subject to the qualifications named every human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. * * *

"This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by

choice. As we have seen, a person may select and make his own domicile and no one may let or hinder. He may elect between his winter and summer residence and make a domicile of either. The right to choose implies the right to declare one's choice, formally or informally as he prefers, and even for the sole purpose of making evidence to prove what his choice was. Such declarations are not self-serving in an improper sense, unless they are made with intent to deceive. If they are false and made for a sinister purpose, they will meet the fate that falsehood always meets in courts of justice when discovered by the triers of fact."

IV.

This legislation violates Article I, Section 9, of the Federal Constitution, because it is in effect a bill of attainder.

A bill of attainder is a legislative act which inflicts punishment without judicial trial.

Cummings v. Missouri, 4 Wall. 323.
In re Yung Sing Hee, 36 Fed. Rep. 437.

The opinion of Judge Deady in the latter of these cases, is quite pertinent. There it had been claimed that the Chinese Exclusion Acts applied to a child of Chinese parents born in the United States, and it was held that, although these acts did not purport to exclude such children, if they did, they would have constituted bills of attainder within the prohibition of the Constitution. Judge Deady said:

"However, if the exclusion act is intended to apply to citizens of the United States of Chinese descent, it

is so far beyond the power of Congress to enact, and therefore unconstitutional and void. The Constitution declares (Article 1, §9), 'No bill of attainder or *ex post facto* law shall be passed.' A bill of attainder is a special act of the legislature, which inflicts punishment without a judicial trial. If the punishment is less than death, the act is called a 'bill of pains and penalties.' *Cummings v. Missouri*, 4 *Wall.* 332. The phrase 'bill of attainder,' as used in the Constitution, includes bills of pains and penalties. *Fletcher v. Peck*, 6 *Cranch.*, 138. Banishment or exile is a recognized mode of punishment. *Rap. & L. Law Dict.* 'Banishment.' The bill against the Earl of Clarendon, passed in the reign of Charles II., enacted that the Earl should suffer perpetual exile, and be forever banished from the realm. *Hume's History of England*.

"A legislative act which undertakes to inflict the punishment of banishment or exile from the United States on a citizen thereof, and thereby deprive him of the right to live in the country, for any cause or no cause, or because of his race or color, is a bill of attainder, within the clause of the Constitution of the United States, prohibiting the passage of such bills, and is therefore void.

"'Bills of this sort,' says Mr. Justice Story, 'have been most usually passed in England in times of rebellion or gross subserviency to the crown, or of violent political excitements; periods, in which all nations, are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others.' *Comm. §1344.*

"'In these cases,' says Mr. Justice Field, 'the legislative body, in addition to its legitimate functions, exercises the powers and office of a judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense.' *Cummings v. Missouri*, 4 *Wall.* 323."

Here Congress, by its enactment, practically adjudges, according to the appellee's view of the statute, that naturalized citizens coming within

the terms of the act, are to be deprived of their citizenship. The order of the court provided for in the statute is a mere formality in a case where the naturalization occurred under the previous law, and the naturalized citizen had before the passage of the act of 1906, violated what are asserted to be its prohibitions. The judgment in such a case is pronounced by the act of Congress.

V.

The act is also an *ex post facto* law, so far as the present case is concerned, because the defendant is punished for acts committed prior to the enactment of the statute.

A statute belongs to the class of *ex post facto* laws which, by its necessary operation, and in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage.

Cummings vs. Missouri, 4 Wall. 277.

Ex parte Garland, 4 Wall. 333.

Thompson v. Utah, 170 U. S. 351.

Calder v. Bull, 3 Dallas, 386.

Green vs. Shumway, 39 N. Y. 418.

The decision in *Johannessen v. United States*, 225 U. S. 227, far from being adverse to this contention, practically sustains it. It is true that there it was decided, that that portion of Section 15 of the act of 1906 which was under consideration, even though retrospective in form, was not an *ex post facto* law. The reason concisely stated by Mr. Justice Pitney was:

"The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges. *We do not question that an act of legislation having the effect to deprive a citizen of his right to vote because of something in his past conduct which was not an offense at the time it was committed would be void as an ex post facto law. Cummings v. Missouri, 4 Wall. 277, 321; Ex parte Garland, 4 Wall. 333, 378.* But the act under consideration inflicts no such punishment, nor any punishment, upon a lawful citizen. It merely provides that, on good cause shown, the question whether one who claims the privileges of citizenship under the certificate of a court has procured that certificate through fraud or other illegal contrivance, shall be examined and determined in orderly judicial proceedings. *The act makes nothing fraudulent or unlawful that was honest and lawful when it was done. It imposes no new penalty upon the wrong-doer.* But if, after fair hearing, it is judicially determined that by wrongful conduct he has obtained a title to citizenship the act provides that he shall be deprived of a privilege that was never rightfully his. Such a statute is not to be deemed an *ex post facto* law."

Here, as has been shown, the appellant became a lawful citizen in 1894. His certificate of naturalization was obtained without fraud or other illegal contrivance. Whatever he did toward becoming a citizen was honest and lawful when it was done. By the second paragraph of Section 15 of the act of 1906, an act, entirely innocent when performed, if it is to receive retrospective application, subjects the appellant to the loss of his privileges as a citizen. He is deprived of his right to vote, because of something in his past conduct which was not an offense at the time when it was committed. He becomes disqualified from owning real estate in New York and other states, and subjects his real property to forfeiture at the instance of the State in which it is located. He is deprived of heritable blood. Hence this

legislation, not only makes him a wrongdoer, although the acts upon which that conclusion is predicated were entirely innocent when performed, but a previously unknown penalty is imposed upon him because of such acts. He is deprived of a privilege that was rightfully his. He is decitizenized by a legislative enactment, which converts a lawful into an unlawful act.

VI.

The appellant was entitled to a trial by jury, of the issues presented in the pleadings.

The Seventh Amendment to the Constitution declares that "in suits of common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

This clause was construed in *Parsons v. Bedford*, 3 Pet., 432, 446, where MR. JUSTICE STORY said:

"The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty and maritime jurisprudence. The Constitution had declared, in the third article, 'that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority,' &c., and to all cases of admiralty and maritime jurisdiction. It is well known, that in civil causes in courts of equity and admiralty juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases, to inform the conscience of the court. When, therefore, we find, that the amendment requires that the

right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the Constitution denominated in the third article 'law'; not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit. * * * In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights."

So in *Knickerbocker Insurance Co. v. Comstock*, 16 Wall. 258, it was held that suits at common law which the right to trial by jury was preserved, embrace all suits which are not of equity or admiralty jurisdiction.

Accordingly claimants of distilled spirits seized upon land in forfeiture proceedings, are entitled to trial by jury.

Garnhart v. United States, 16 Wall. 162.

In the trial of all cases of seizure on land, the court proceeds as a court of common law, and the trial of issues of fact must be by jury.

The Sarah, 8 Wheat. 391.

Morris v. United States, 8 Wall. 507.

The same rule is applied in bankruptcy proceedings.

Elliott v. Toeppner, 187 U. S. 327.

In the present proceeding, the highest conceivable personal right was involved, that of citizenship. The effect of an adverse judgment is to deprive the defendant of that right. The mere fact that the relief sought is in form the cancellation of the certificate of naturalization, does not make the case in its essential nature any the less one of common law jurisdiction, than is a case involving the confiscation of property, or the possession of chattels, or of realty, or the liberty of a citizen.

We are not unmindful of the fact that, in *United States v. Mansour*, 170 Fed. Rep. 671, a suit for the cancellation of a certificate of naturalization fraudulently procured, was held to be one in which the defendant was not entitled as a right to a jury trial. That was however in effect, a suit in equity to set aside a judgment on the ground of fraud in its concoction. That decision has no application to a case where citizenship was unquestionably acquired through valid naturalization proceedings, and where it is sought to take away such right of citizenship because of an alleged change of residence or domicile subsequent to naturalization. In its essential nature such a proceeding seeks the imposition of a penalty or forfeiture, and therefore involves common law as distinguished from equitable rights.

VII.

**It is respectfully submitted that
the decree appealed from should be
reversed and the proceedings dis-
missed with costs.**

LOUIS MARSHALL,
A. M. FRIEDENBERG,
Appellant's Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

GEORGE A. LURIA, APPELLANT, }
v. } No. 248.
THE UNITED STATES. }

*APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

This is a suit to cancel appellant's certificate of naturalization, it being alleged in the complaint that it had been "procured illegally." (R., 1, 2.)

The substantial issue is fraud by Luria in the procurement of his certificate, and it was so ruled by the District Court, despite the fact that it regarded the complaint as insufficient on that point as a matter of pleading. (R., 30-31.)

The charge of fraud is based upon the fact that shortly after his naturalization by the Court of Common Pleas for the City and County of New York in July, 1894, the defendant, Luria, went to South

Africa and took up his permanent residence there, the evidence showing lack of intention at the time of his naturalization to reside permanently in the United States.

The case was tried by the court upon a stipulation of facts (R., 4), to which certain exhibits were attached (R., 7-17), and certain other exhibits (R., 19-28), all of which were duly offered in evidence (R., 18-19).

The defendant moved to dismiss the complaint on grounds substantially now urged upon this court for a reversal of the judgment of the District Court, but the motion was overruled. (R., 19.)

In an opinion (R., 29 et seq.) the District Court sustained the constitutionality of section 15 of the naturalization act of June 29, 1906, held that the evidence warranted the belief that Luria had taken up permanent residence in South Africa, and directed the cancellation of his certificate, entering a decree accordingly (R., 34).

From this judgment Luria appealed to this court.

THE STATUTE INVOLVED.

Naturalization Act of June 29, 1906 (34 Stat., 596, 601), provides:

SEC. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days' personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

If any alien who shall have secured a certificate of citizenship under the provisions of this act shall, within five years after the issuance of such certificate, return to the country

of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered *prima facie* evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be

the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Immigration and Naturalization of such cancellation.

The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.

ARGUMENT.

I.

Section 15 of the naturalization act of June 29, 1906, is constitutional, even as applied to certificates of naturalization procured under prior statutes.

This was expressly so ruled in *Johannessen v. United States* (225 U. S., 227).

The Johannessen case is sought to be distinguished on the ground that the cancellation of his certificate was obtained on the ground of fraud, while in this case the complaint, it is alleged, does not charge fraud. But, as above stated, the District Court considered the material issue to be fraud, notwithstanding the insufficiency of the complaint, on this point as a matter of pleading, and this ruling was made without objection on the part of the defendant. (R., 31-32.)

The case, as considered by the District Court, is therefore identical with the Johannessen case.

The argument that the statute in question is unconstitutional because it amounts to a bill of attainder and an *ex post facto* law is also disposed of by the Johannessen case.

II.

The provisions of the second paragraph of the act of 1906, making the taking up of permanent residence abroad within five years after an alien's naturalization *prima facie* evidence of a lack of intention on his part to become a permanent resident of the United States at the time of filing his application for citizenship, is valid and constitutional.

The rule declared is only *prima facie*, and yields, as expressly provided by the statute itself and as held by the District Court (R., 30), to countervailing evidence.

The authority to establish such a presumption is well settled.

In *Mobile, J. & K. C. R. R. v. Turnipseed* (219 U. S., 35, 42) this court, speaking by Mr. Justice Lurton, said:

Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and State dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. A few of the leading ones are *Adams v. New York* (192 U. S., 585); *People v. Cannon* (139 N. Y., 32); *Horne v. Memphis, &c., Ry.* (1 Coldwell (Tenn.), 72); *Meadowcroft v. The People* (163 Illinois, 56); *Commonwealth v. Williams* (6 Gray, 1); *State v. Thomas* (144 Alabama, 77).

In *Bailey v. Alabama* (219 U. S., 219, 238), where the statute of Alabama involved was held unconstitutional because the presumption established thereby

was practically conclusive and in violation of the Thirteenth Amendment, the court, speaking by Mr. Justice Hughes, said:

This court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own Government. (*Fong Yue Ting v. United States*, 149 U. S., 698, 749.) In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue; and where the inference is not purely arbitrary and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law. (*Adams v. New York*, 192 U. S., 585; *Mobile, Jackson & Kansas City Railroad Co. v. Turnipseed*, decided December 19, 1910, *ante*, p. 35.)

The fact that the presumption applies to the trial of an issue to be determined by facts which occurred before the presumption existed is immaterial.

Webb v. Den, 17 How., 576.

Howard v. Moot, 64 N. Y., 262.

Rich v. Flanders, 39 N. H., 304.

As said by the Distict Court (R., 30), this is only a species of the general regulation of procedure which the legislature may always change, even when, as in the case of criminal statutes passed by

the States, it is subject to the prohibition against *ex post facto* legislation.

Hopt v. Utah, 110 U. S., 574.

Thompson v. Missouri, 171 U. S., 380.

Of course, as said by this court in *Bailey v. Alabama*, *supra*, there must be some relation between the facts referred to in the rule to justify the inference which it creates. In this case, as pointed out by the District Court (R., 30), if the change of residence occurs shortly after the naturalization of a person, the inference of a lack of intention at the time to reside permanently in the United States is strong, while if a considerable period elapses before the change it is weak.

But, as said by Mr. Justice Holmes in his dissenting opinion in *Keller v. United States* (213 U. S., 149), "how far back such an inference shall reach is a question of degree."

III.

The provisions of the second paragraph of section 15 of the naturalization act of 1906 apply to persons who have secured certificates of citizenship under the provisions of previous acts.

It is true the second paragraph is confined to "any alien who shall have secured a certificate of citizenship under the provisions of this act." But this limitation appears to be removed by the fourth paragraph, which provides—

The provisions of this section shall apply not only to certificates of citizenship issued

under the provisions of this act, but *to all certificates of citizenship which may have been issued heretofore* by any court exercising jurisdiction in naturalization proceedings under prior laws.

Appellant refers to the legislative history of the act for the purpose of showing that the language of the fourth paragraph should not be held to apply to the provisions of the second paragraph. But are we justified by the circumstance that the second paragraph may have been inserted by way of amendment, prior to the passage of the act, in making an exception of its provisions from the explicit language of the fourth paragraph?

Appellant also points out in this connection that the naturalization statutes, prior to the act of 1906, did not require an applicant to state in his petition for naturalization that he intended to reside permanently within the United States, as section 4 of the latter act does. But was not such a condition implied under the prior law? Was it not equally a fraud under the prior statutes for an alien to secure naturalization when he had no intention of residing permanently in the United States, but, on the contrary, intended to take up his permanent residence abroad? Manifestly, in such a case, his purpose in securing naturalization would be to obtain the benefits of American citizenship, including protection abroad (see Sec. 2000, Revised Statutes), without performing any of the duties or obligations of a citizen. This would be clearly a fraud upon the United States, and

in expressly declaring it to be such in the act of 1906 Congress did no more than recognize what was already apparent. So, in his opinion in this case, Judge Hand said (R., 30):

* * * A man becoming a citizen should intend to live here permanently.

It is submitted, therefore, that the second paragraph of the act of 1906 merely creates a rule of evidence which is equally applicable to certificates of naturalization secured under prior statutes, and that Congress must be held to have intended what it said in the fourth paragraph, namely, that "*the provisions of this section*" should apply as well to such certificates as to those secured under the act of 1906.

IV.

For the purposes of this case, it is immaterial whether the second paragraph of the act of 1906 applies to certificates of naturalization secured under prior statutes.

Since "countervailing evidence" was introduced on behalf of Luria, it became necessary for the Government to establish, not only that he had established a permanent residence in South Africa, but that he went there under such circumstances as to indicate that at the time of his naturalization he did not intend to reside permanently in the United States. The rule of evidence established by the second paragraph of the act of 1906 therefore ceased to be operative, and the Government was forced to prove its case just as if that rule did not exist. That this is the way the District Court interpreted the

statute is shown by the following extract from its opinion (R., 29-30):

The presumption is that evidence of the acquisition of a new *domicil*, i. e., "permanent residence," within five years shall be *prima facie* evidence of fraud. The only ground to question this is because it denies due process of law, or interferes with a judicial function. A presumption is only a rule of procedure. It provides that certain evidence shall throw upon the other side the duty of showing his hand, if he has any, or of losing his case, and that is all it does. *If once the defendant puts in material evidence of his own, then the evidence which constitutes the presumption merely takes its place as such for whatever probative force it may have, and the tribunal which judges the facts need not regard it as having any further weight than if no presumption existed.* Once the issue be opened the facts are judged like any other facts. Any other rule would require some quantitative valuation of testimony which is in almost every case unknown to our law. Therefore, a presumption does not either take from the court its duty to decide upon the facts, or even take from the moving party the burden of proof, i. e., the requirement of satisfying the judgment of the tribunal of fact upon each of the essential facts which together make up the "cause of action."

Again, in sustaining the rule, the court said (R., 30):

* * * A man becoming a citizen should intend to live here permanently, and if he changes within five years, I can not say that

there is no possible inference from it that he never meant to live here permanently. *If he has had an actual change of intent, he can show it.*

And this is followed by the statement that the material issue is that of fraud, "the change of residence being only *prima facie* proof upon that issue."

It is submitted, therefore, that if the facts of this case show, as the Government contends that they do, that Luria, after procuring his naturalization, took up his permanent residence in South Africa under such circumstances as to indicate a lack of intention to reside permanently in the United States at the time of his naturalization, a case of fraud is presented independent of the *prima facie* rule declared by the second paragraph of section 15 of the act of 1906. The requisite fraudulent intent could be inferred, under such circumstances, without the assistance of that rule.

In *Bailey v. Alabama* (219 U. S., 249) Mr. Justice Holmes said that the inference of criminal intent from subsequent conduct was not unknown to the common law, citing *Commonwealth v. Rubin* (165 Mass., 453); and in his dissenting opinion in *Keller v. United States* (213 U. S., 149) he points out that a like inference may be made from the conduct of an alien woman after she has entered the United States.

It will be observed, in this connection, that even if the rule of evidence established by the second paragraph of section 15 of the act of 1906 be held

not to apply to certificates of naturalization secured under prior acts, the provisions of the first paragraph nevertheless authorize their cancellation for fraud or illegality, by virtue of the express declaration of the fourth paragraph.

V.

The evidence shows that Luria took up his permanent residence in South Africa under such circumstances as to justify the presumption that he had no intention of residing permanently in the United States at the time of his naturalization.

Luria came to this country from Russia in April, 1888, when he was twenty years of age. The next year he went to a New York medical college, studying there for four years and graduating April 4, 1893. (R., 4-5.)

After his graduation, namely, June 19, 1893, he applied for admission to the New York County Medical Association, an association composed of practicing physicians, but was never admitted (R., 5), although he resided in Brooklyn, N. Y., for over a year longer.

It seems a fair inference from these facts and his subsequent behavior that he then determined to go to South Africa and take up the practice of medicine there.

He first completed his naturalization by applying for and obtaining a certificate of naturalization on July 3, 1894, having made a declaration of intention to become a citizen in 1892. (R., 5.)

He then obtained a passport (August 29, 1894), less than two months after his naturalization, sold his

drug store (October 24, 1894), and sailed on November 21, 1894, for South Africa, arriving at the Transvaal on December 22, 1894. (R., 5).

He sojourned in the city of Johannesburg, South Africa, continuously from December 22, 1894, to some time in the spring of 1907, "he claiming that his health was impaired, and that it was therefore necessary for him to sojourn in a climate similar to that of South Africa," and during that period he practiced his profession as a physician for his livelihood, joined the South African Medical Association, and also served in the Boer War. (R., 5.)

In the spring of 1907 he returned to the United States and took a postgraduate course in medicine, giving as his address upon entering the postgraduate school Johannesburg, South Africa. (R., 6.)

He remained in the United States on the occasion of this visit until the following August, and during this period he did not practice his profession as a physician in New York, but "stated to several persons in New York City that he did not then expect to stay in the United States, but was going to return soon to South Africa, giving no reason therefor." (R., 6.)

On or about August 21, 1907, he returned to South Africa and resumed the practice of his profession, and has continued to sojourn there ever since.

As the stipulation of facts was dated December 8, 1910, it appears that at that time Luria had been residing in South Africa for sixteen years.

These facts, it is submitted, not only justify the inference that Luria had taken up his permanent

residence in South Africa, but that at the time of his naturalization he had no intention of residing permanently in the United States.

The District Court correctly construed the words "permanent residence" in the second paragraph of the naturalization act of June 29, 1906, as meaning *domicil*.

The facts necessary to prove a change of *domicil* are clearly stated in *Ennis v. Smith* (14 How., 422-423), where this court said:

Kosciusko's *domicil* of origin was Lithuania, in Poland. The presumption of law is that it was retained, unless the change is proved, and the burden of proving it is upon him who alleges the changes. (*Somerville v. Somerville*, 5 Ves., 787; *Voet, Pand.*, tit. 1, 5, N. 99.)

But what amount of proof is necessary to change a *domicil* of origin into a *prima facie* *domicil* of choice? It is residence elsewhere, or where a person lives out of the *domicil* of origin. That repels the presumption of its continuance, and casts upon him who denies the *domicil* of choice the burden of disproving it. Where a person lives, is taken *prima facie* to be his *domicil*, until other facts establish the contrary. (*Story's Com.*, 44, 6 Rule; *Bruce v. Bruce*, 2 Bos. & P., 228, Note 239; 3 Ves., 198, 291; *Hagg. Cons.*, 374, 437.) It is difficult to lay down any rule under which every instance of residence could be brought which may make a *domicil* of choice; but there must be to constitute it actual residence in the place, with the intention that it is to be a principal and per-

manent residence. That intention may be inferred from the circumstances or condition in which a person may be as to the domicil of his origin, or from the seat of his fortune, his family, and pursuits of life. (Pothier, *Introd. Gen. aux Cout.*, p. 4; D'Argentié, *Cout.*, Art. 449; Toullier, *lib. 1, tit. 3, n. 371*; 1 *Burge, Com. Confl. Laws*, 42, 43.) A removal which does not contemplate an absence from the former domicil for an indefinite and uncertain time is not a change of it. But when there is a removal, unless it can be shown or inferred from circumstances that it was for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession, office, or calling, it does change the domicil. The result is, that the place of residence is *prima facie* the domicil, unless there be some motive for that residence not inconsistent with a clearly established intention to retain a permanent residence in another place. The facts in the case place the residence of Kosciusko in France, under the principle just stated.

See also *Morris v. Gilmer* (129 U. S., 328) and *Anderson v. Watt* (138 U. S., 706).

The only evidence tending to contradict that just mentioned as to Luria's change of permanent residence or domicil from the United States to South Africa is his statements in his several applications for passports that he was only temporarily residing in Johannesburg, South Africa, and intended to return to the United States (within two years according to

some of said applications) and the certificates of two physicians.

One of these certificates states that Luria "was under my treatment for some time, suffering from a pulmonary affection, which required a high altitude and a rarified atmosphere, such as the uplands of the Transvaal afford," that he had benefited immensely by his residence there, and that it was necessary for his continued health "that he should continue to reside in a warm and dry climate, such as this country affords." (R., 28.)

The other certificate merely states that the physician making it had treated Dr. Luria for some years for a naso-pharyngeal affection and that he had benefited by a residence in the rarified atmosphere of the uplands of South Africa.

There was no evidence that Luria was in ill health at the time of or prior to his removal to South Africa.

The Government introduced in evidence the report made to the State Department by the United States consul at Pretoria, South Africa, on November 25, 1907, on an application of Luria to register as an American citizen, which the consul had denied. (R., 25.) In that report the consul said (R., 26):

* * * I can not accept his statement as a truthful one that he came here for the purpose of regaining his health, for the deponent is a splendid specimen of physical manhood.

The consul further said (R., 26):

Furthermore, I am prepared to certify that the said Luria did not intend in good faith to

become a citizen of the United States when he applied for naturalization; and under circular instruction "Reports of Fraudulent Naturalization," April 19, 1907, he should be classed with that number who secured their naturalization through fraudulent means. As he lived but six and one-half years in the United States, only four months of which he was a citizen of that country, and as he has been a continuous inhabitant of Johannesburg, Transvaal, for the past twelve and a half years, I am also prepared to certify that he is a permanent resident of South Africa, and that his permanent residence was taken up within five years after his naturalization was conferred.

The American consular agent at Johannesburg had previously recommended to the consul at Pretoria that he refuse to permit Dr. Luria to register. (R., 20-23.) Referring to the passport issued to Luria by the consul at Pretoria when the former visited the United States in 1907, the consular agent at Johannesburg said (R., 22):

There is, however, the further question, whether you, or I, acting on your behalf, are in a position to insist on his placing his passport and certificate of naturalization in your possession. There is no doubt in my mind that when Luria obtained this passport, the Department was not in possession of the real facts of his case, and that therefore the passport was obtained under false pretences. It seems, then, to be our duty to obtain

possession of it until the Department has had the case correctly placed before it.

* * * * *

I have gone rather fully into this case as I think it is a pronounced one of abuse of our naturalization laws * * *

VI.

Appellant was not entitled to trial by jury.

A suit to cancel a certificate of naturalization on the ground of fraud in no wise differs from a suit to cancel a patent, and is clearly an equitable proceeding.

This point was disposed of by the District Court in the *Mansour* case (170 Fed. Rep., 671), which was affirmed by this court at the present term (226 U. S., 604).

It is respectfully submitted that the judgment of the District Court should be affirmed.

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